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THE ALL ENGLAND LAW REPORTS ANNOTATED

CAMDEN NOMINEES, LTD. *v.* SLACK AND OTHERS.

[CHANCERY DIVISION (Simonds, J.), **February 21, 22, 23, 27, 1940.**]

Tort—Inducing breach of contract—Justification—Tenants association—Withholding rent.

C The plaintiffs were owners of a block of flats let upon tenancy agreements in a standard form, which included the obligation of the tenant to pay the rent and the obligation of the landlord to light and clean the common staircase and maintain constant hot water and central heating. It was assumed that the landlord's obligations had not been fulfilled. The defendants were active in forming an association of the tenants, D and in calling meetings of the tenants, and otherwise urged upon their fellow-tenants that they should withhold their rent:—

HELD: (i) the defendants had knowingly interfered with the contracts between the plaintiffs and their tenants.

(ii) there was no justification for such interference, either on the ground of common interest in making the plaintiffs perform their E obligations or on the ground of the weakness of the position of each of the tenants as compared with that of the plaintiffs.

[**EDITORIAL NOTE.** The substantial question here is whether the facts of the present case can be brought within the decision in *Brimelow* v. *Casson* (10), but it is held that the present is not a comparable case. The question of justification on the ground of common interest is fully considered, and it is decided that a person F urging others to break their contracts with a third party cannot justify their action on the ground of common interest.

AS TO JUSTIFICATION, see HALSBURY, Hailsham Edn., Vol. 32, pp. 164-166, paras. 233-237; and FOR CASES, see DIGEST, Vol. 42, pp. 989, 990, Nos. 180-194.]

Cases referred to:

G (1) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 42 Digest 987, *169*; 22 L.J.Q.B. 463.

(2) *Bowen* v. *Hall* (1881), 6 Q.B.D. 333; 42 Digest 988, *174*; 50 L.J.Q.B. 305; 44 L.T. 75.

(3) *Temperton* v. *Russell*, [1893] 1 Q.B. 715; 42 Digest 987, *170*; 62 L.J.Q.B. 412; 69 L.T. 78.

(4) *Quinn* v. *Leathem*, [1901] A.C. 495; 42 Digest 971, *30*; 70 L.J.P.C. 76; H 85 L.T. 289.

(5) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland & Wales*, [1902] 2 K.B. 732; 42 Digest 988, *176*; 71 L.J.K.B. 994; 87 L.T. 493; *varying*, [1902] 2 K.B. 88.

(6) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 42 Digest 989, *180*; 74 L.J.K.B. 525; 92 L.T. 710; *affg.*, [1903] 2 K.B. 545.

(7) *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 42 Digest 968, *6*; 58 L.J.Q.B. 465; 61 L.T. 820.

(8) *Smithies* v. *National Assocn. of Operative Plasterers*, [1909] 1 K.B. 310; 43 Digest 115, *1197*; 78 L.J.K.B. 259; 100 L.T. 172.

(9) *Pratt* v. *British Medical Assocn.*, [1919] 1 K.B. 244; 42 Digest 973, *44*; 88 L.J.K.B. 628; 120 L.T. 41.

(10) *Brimelow* v. *Casson*, [1924] 1 Ch. 302; 43 Digest 115, *1194*; 93 L.J.Ch. 256; 130 L.T. 725.

(11) *De Jetley Marks* v. *Greenwood (Lord)*, [1936] 1 All E.R. 863; Digest Supp.

(12) *British Industrial Plastics, Ltd.* v. *Ferguson*, [1940] 1 All E.R. 479; Digest Supp.; *affg.*, [1938] 4 All E.R. 504; 160 L.T. 95.

Action claiming an injunction restraining the defendants from doing any acts or making any statements or taking any steps calculated or intended to cause or induce the plaintiffs' tenants of a certain block of flats, or any of them, to commit breaches of their tenancy agreements with the plaintiffs by non-payment of rent or otherwise. The facts are fully set out in the judgment.

Sir George W. H. Jones and *S. W. Magnus* for the plaintiffs.

H. Lester for the defendants.

Lester: The mere fact that the defendants were respectively secretary and chairman of the tenants association does not mean that they are responsible for having incited or procured the members present at a meeting to come to a decision which is properly voted upon by the members. The report of Dec. 2 was not intended to induce tenants to withhold payment of rent. To induce a breach of contract means to create a reason for breaking it. To advise a breach of contract is to point out the reasons which already exist. The former is actionable, but the latter has never been held to be so: *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (6) and Salmond on Torts, 9th Edn., p. 389. If it is held on the facts that the defendants or either of them induced the tenants to break their agreement by withholding rent, there was ample justification for their so doing. The plaintiffs had themselves been guilty of grave breaches of agreements, causing injury to the tenants. The defendants and the other tenants had a common interest in their grievances against the plaintiffs and their desire to have them remedied. It is a travesty to assume that one poor tenant is in a position effectively to put forward his case against a rich landlord company. For this reason, because of the privileged position of landlords, tenants are justified in banding together and refusing to pay rent until their grievances have been settled. The limits of justification in inducing a breach of contract have never been settled: *Brimelow* v. *Casson* (10), and cases cited therein. In the circumstances of this case, the tenants had no means other than the withholding of rent which might effectively cause the plaintiffs to comply with the terms of their agreement, and they were justified in using those means.

Jones: The evidence submitted by the defendants amounts in law to an admission that they have each severally interfered knowingly with the contractual rights of the plaintiff company. There is direct evidence that the defendants attempted to induce other tenants to withhold their rents. If one party without justification knowingly interferes with a contract between two other parties, he commits an actionable wrong. The fact that the tenants have various grievances in respect of certain facts does not of itself justify the withholding of rent, nor can it be said that these facts bring this case within the scope of the decision of *Brimelow* v. *Casson* (10). The justification must involve an action taken as a duty, not the mere protection of the defendants' own interests: *De Jetley Marks* v. *Greenwood* (*Lord*) (11). There can be no justification where the law supplies another remedy for the grievances. The proper course is for the tenants to bring an action. The fact that the landlord has broken his covenant does not justify the tenants in breaking their covenant to pay rent. It was laid down in *Smithies* v. *National Assocn. of Operative Plasterers* (8) that, where there are two independent contracts, the breach of the one by the one party does not entitle the other party to commit a breach of the other contract. Here there are not separate contracts, but there are separate covenants. The most extreme case was *Brimelow* v. *Casson* (10).

Magnus: Where there is a sufficient legal remedy elsewhere, nothing can justify a breach of contract. There may be justification where the act has been done as a result of a specific duty on the part of the defendants, as in *De Jetley Marks* v. *Greenwood* (*Lord*) (11). This refers only to a legal or moral duty, and not to a self-imposed one. [Counsel referred to *British Industrial Plastics, Ltd.* v. *Ferguson* (12), *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (5) and *Pratt* v. *British Medical Assocn.* (9).] Even if the defendants had not seriously induced the tenants to withhold their rents, if the association, which is an incorporate body, itself did so induce, then Miss Forcey, as chairman, and Mr. Bennett, as secretary, are liable.

SIMONDS, J.: In this action, the plaintiffs, Camden Nominees, Ltd., claim an injunction restraining the defendants Ethel May Forcey and Ronald Vincent Bennett from doing any acts or making any statements or taking any steps calculated or intended to cause or induce the plaintiffs' tenants of Highstone Mansions, Camden Road, London, or any of them, to commit breaches of their tenancy agreements with the plaintiffs by non-payment of rent or otherwise. The matter came before me on motion some short time ago, when, since it appeared that there was an acute conflict of evidence, upon which cross-examination was desirable, I adjourned the hearing for that purpose. Further, since both parties wished it, I assented to the hearing of the motion being treated as the trial of the action without any pleadings. It would have been better if I had not done so, for the pleas upon which the parties rely might then have been stated with precision.

The law as I understand it is that, if A without justification knowingly interferes with a contract between B and C, he commits an actionable wrong. It is upon the words "without justification" that the difficulty arises, and it was in order to consider them that I reserved judgment in a case otherwise very clear. Two questions have to be considered—namely, (i) have the defendants knowingly interfered with the contracts between the plaintiffs and their tenants, or do they threaten to do so? (ii) if yea, have they justification in law for doing so?

The facts, as I find them, are shortly as follow. The plaintiffs are the owners of a block of flats known as Highstone Mansions, Camden Road. The flats are let upon tenancy agreements which are in a standard form, each agreement containing (*a*) an obligation on the tenant to pay his rent, usually by monthly instalments in advance, and other usual obligations, and (*b*) certain obligations on the landlord, including that of lighting the staircase and landings and keeping them properly cleaned and swept, and of maintaining constant hot water and central heating. The defendant Miss Forcey is the tenant of flat No. 49, while the defendant Bennett is the tenant of flat No. 44, and there have at all material times been some sixty other tenants in the block.

In the autumn of 1939, certain of the tenants complained that the landlords were not satisfactorily carrying out their obligations under the tenancy agreements. How far their complaints were well-founded I do not propose to consider. I am content to assume that they were made in good faith. On Oct. 28, 1939, the defendant Miss Forcey addressed a long letter to the plaintiffs in which she set out her grievances, demanded their redress and concluded by saying:

> Pending satisfaction I am reluctantly compelled to give instructions for withholding rent.

This, she told me, meant that she would cancel her bankers' order for payment of rent. A similar course had already been taken by at least one other tenant. It is clear, nor has the contrary been suggested by her counsel, that it is no answer to a claim for rent for the tenant to say that the landlord has not performed his obligation to clean the staircase or furnish hot water. Miss Forcey was, therefore, in her letter taking up a position which in law was not tenable. To her letter of Oct. 28, 1939, and another written on Oct. 29, 1939, she received an answer, dated Nov. 6, 1939, which gave her no satisfaction. In the meantime, she had, naturally enough, taken counsel with other tenants, including her co-defendant Bennett. A small group of them had held a meeting in one of the flats, at which it was resolved to form a tenants association of which Bennett should be secretary. On Nov. 10, a notice signed by Bennett as "secretary *pro tem.*" was delivered at the flats in the block. It was in these terms:

> Dear Sir or Madam, An association of tenants of Highstone Mansions is being formed to deal with difficulties regarding lack of heating, hot water, porterage and other facilities which repeated complaints have failed to improve. It is the intention of the association to approach the landlord and insist on the maintenance of proper services. A meeting of tenants will be held at 8 p.m. on Monday, Nov. 13,

> at No. 44. If you are interested, will you kindly sign this notice and return to me. Yours faithfully, R. Vincent Bennett, secretary *pro tem.*

The notice at the bottom is in these terms:

> I am interested in joining the association. No. ——. Please state whether you can attend the meeting.

Then the answer is to be filled in. The word "insist" is used. It may be that the authors of this notice had in mind some process of law, or they may have contemplated the use of some other weapon. Upon this there is no satisfactory evidence.

On Nov. 13, the meeting was duly held at the flat of the defendant Bennett. According to the minutes, which were signed by Miss Forcey, there were present 13 persons who were tenants or the wives of tenants, and, in addition, certain persons who were described as "representatives of the St. Pancras Tenants' Defence League." Various aspects of the tenancy agreement were discussed, and it was agreed that the tenants had grounds of complaint, and that they held the landlords responsible for breach of contract in regard to several matters set out in the minutes. The representatives of the St. Pancras Tenants' Defence League explained the objects and activities of their organisation, saying that it operated democratically for civic services and was an unpolitical body, and answered many questions. They then left.

It was then decided to form a tenants association of the tenants of Highstone Mansions, and a committee was elected, of which the defendant Miss Forcey was chairman, the defendant Bennett secretary, and certain other tenants members. It was further resolved that one member on each floor should canvass for new membership to the association, and that the committee should meet on the following day to draft a constitution and formulate a plan of action. The propriety and legality of this gathering, and of its aims as they appear in the minutes, are beyond question. No mention is made of withholding of rent, and, though I find it hard to believe that the meeting met and dissolved without any reference to the weapon which Miss Forcey had herself threatened to use, I should not be justified in finding that any attempt was then made by her or the defendant Bennett to induce other tenants to take that course.

On Nov. 14 and on Nov. 16, meetings of the committee were held. The defendants Miss Forcey and Bennett were both present at both meetings, as a result of which a constitution of the association was drafted after further consultation with the St. Pancras Tenants' Defence League, and it was decided to affiliate the association to that body. I need not refer to the constitution beyond saying that the objects of the association were defined to be (*a*) by united co-operative effort to safeguard the rights and interests of tenants of Highstone Mansions, and (*b*) to affiliate to organisations with similar aims and objects. Such objects are lawful, though the means of attaining them may be lawful or unlawful.

On Nov. 17, the defendant Bennett again circularised all the tenants stating what had been done at the general meeting on Nov. 13, and by the committee since that date, and saying that another general meeting would be held on Nov. 20, at 8 p.m., and that it was :

> . . . to the advantage of all tenants in no matter what circumstances to attend this meeting.

On Nov. 20, a general meeting was duly held. In addition to the defendant Miss Forcey in the chair and the defendant Bennett as secretary, and other members of the committee, there were present 17 tenants or wives of tenants, and for part of the time also representatives of the St. Pancras Tenants' Defence League. Certain amendments were made in the draft constitution, which, as so amended, was agreed. It was then resolved that the committee should send a letter forthwith to the landlords setting out a list of the tenants' complaints and demanding negotiation and early reply, and it was further resolved (with two dissentients) that, failing satisfactory response by the landlords and the remedying of complaints, rent should be withheld. There is a conflict of evidence about the part played by the defendants at this meeting. I will complete the history of events before dealing with that question.

Immediately after the meeting, the defendant Bennett, as secretary of the association, wrote to the secretary of the plaintiffs a letter, dated Nov. 20, stating the tenants' grievances and claims, and asking that representatives of the plaintiffs should meet representatives of the association. He said that he expected to hear from the plaintiffs to that effect by Friday, Nov. 24, and that, pending such meeting, any legal action should be stayed forthwith. This referred, I think, to the fact that the plaintiffs had already taken, or threatened, action in regard to certain rent in arrear.

On Nov. 21, the defendant Bennett sent a further circular to all the tenants. The first two paragraphs of the circular were as follows :

> (1) Following up the big meeting of last night, if you have not already done so, will all members (including those who were unable to attend) please write down all their grievances and difficulties of the past and present, and leave at the secretary's address—Flat 44. (2) Will those few tenants who were unable to attend let the secretary know that they are supporting the large majority of the tenants, and will make common cause with them. Will members please arrange to sign the constitution at the earliest convenience.

The circular then went on to say that a strong and clear letter had been sent to the landlords demanding a meeting, and finally asked for subscriptions.

On Nov. 23, the plaintiffs' solicitors answered the defendant Bennett by a letter which the association no doubt regarded as wholly unsatisfactory. They rejected the complaints as totally untrue, or else as very much exaggerated, and as being an attempt to justify the non-payment of rent, and said that, while they were prepared to deal with individual tenants, they did not propose to recognise the association. On Nov. 24, the defendant Bennett retorted by reasserting the validity of the complaints and saying :

> Rent is being temporarily withheld until such time as we are satisfied that the landlords have fulfilled their obligations under the agreements.

On Nov. 27, a general meeting of the association was held, at which the defendants and other members of the committee and 13 members of the association attended. It appears that at this meeting the conduct of the committee in their correspondence with the plaintiffs and their solicitors was approved, and a further letter was drafted for tenants to inform the landlords that rent was being withheld. This letter was addressed to the secretary of the plaintiffs, and was as follows:

> Sir, I hereby indorse the letter of the Highstone Mansions Tenants Association of Nov. 20, and pending a satisfactory conclusion of the proposed negotiations I have to advise you that I am withholding the rent presently due.

On Nov. 28, letters in this common form were signed and sent to the plaintiffs by 12 tenants, and on Dec. 2 more such letters were sent by 4 more tenants, including the defendant Bennett. On Dec. 2, there was issued to all tenants a notice, headed "Report 2.12.39," for which both defendants admit responsibility. Two paragraphs in it may be noticed. The first runs as follows:

> Several tenants have been visited by the landlords' representative in an effort to "divide and conquer" and in each case he has been unsuccessful and referred to the association. If, therefore, you receive a visit, please advise a member of the committee. It is to be hoped (and expected) that tenants will stick together in accordance with the democratic resolution of the general meeting. This is the testing time.

Then, after a paragraph that I need not read, there is this paragraph:

> If you have not yet (*a*) paid your sub., (*b*) signed the constitution, (*c*) notified the landlords you are withholding rent pending satisfactory conclusion to the communication the association has addressed to them, (d) not sent us details of your own complaints and claims, please communicate with the secretary, chairman, or members of the committee—Flats Nos. 44, 49, 52, 20, either calling personally or leaving a note stating when you are available to be seen.

No further event of any importance took place before Dec. 15, when the writ in this action was issued.

I return to the meeting of Nov. 20. The defendants would have me believe that the important resolution then passed for the withholding of rent was something for which they were not in any way responsible, and that the idea of doing so was, in some way which they could not explain, generated in the minds of those present. On the other hand, Miss Dribbell, who was one of the two dissentients, deposed to the fact that Miss Forcey said that she and certain other tenants had stopped paying their rents and requested all the tenants present to do the same, and that it was she who invited the tenants to withhold their rents and asked them to signify their consent by raising their hands. In this she was corroborated by the other dissentient, Mrs. Farren. Having heard and seen the witnesses, I have no hesitation in accepting this evidence, which, moreover, accords with probability. Miss Forcey was the protagonist in this dispute. Already on Oct. 28 she had adopted for herself this method of persuading the plaintiffs to remedy her grievance. It would be strange if, realising that such a method would be more persuasive, if not coercive, when adopted by others, she did not advocate

its adoption. I believe the witnesses who say that she did what I should have expected her to do. Against the defendant Bennett there is no evidence of any spoken word. It is clear, however, that he took a leading part in forming the association and guiding its policy, and the so-called report of Dec. 2, for which, as I have said, he candidly admitted responsibility, by itself demands that I should find against him upon the A
issue of endeavouring to persuade his fellow-tenants to break their agreements by withholding rent.

Against both defendants, then, I must find for the plaintiffs on the first question, and then there arises the second question—namely, whether or not the defendants had justification in law for what they did. B
This is a field in which it behoves a judge of first instance to walk warily. He has little to guide him. By the end of the nineteenth century, it had been clearly established as the result of a number of cases, of which *Lumley* v. *Gye* (1), *Bowen* v. *Hall* (2) and *Temperton* v. *Russell* (3), decided in 1853, 1881 and 1893, respectively, may be taken as the landmarks, C
that it is an actionable wrong without justification to interfere with the contractual rights of another. That this result was not easily reached may be seen from the powerful dissenting judgment of COLERIDGE, J., in *Lumley* v. *Gye* (1) and of LORD COLERIDGE, L.C.J., in *Bowen* v. *Hall* (2). However, while the general proposition was thus established, and, as is D
generally accepted, a remarkable development made in the law of torts, no corresponding definition was given of what amounts to justification for such interference. Thus, in *Quinn* v. *Leathem* (4), LORD MACNAGHTEN says, at p. 510 : E

> . . . it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

He does not, however, say what is sufficient justification. In *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland & Wales* (5), DARLING, J., after citing the statement of the law by LORD MACNAGHTEN, F
instances as an example of justification the case of a man who has entered into two inconsistent contracts with A and B, and cannot perform the one without breaking the other. In such a case, it is suggested that A, insisting on his contractual rights, is not liable at the suit of B. He gives no other example of justification. The same case in the Court G
of Appeal is useful as showing (i) that what is otherwise wrong is not made better by an honest belief that it is very much to the advantage of the person committing the wrong, and (ii) that, where illegal means are used, "just cause" cannot come into the discussion at all. In *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (6), a further H
discussion of justification will be found. In the dissenting judgment of VAUGHAN WILLIAMS, L.J., there are passages which indicate that community of interest might constitute justification, but I do not think that this view is consistent with the judgment of the majority of that court, or with the opinions in the House of Lords, to which I shall presently

refer. Romer, L.J., after referring to the observations of Sir Richard Henn Collins, M.R., in *Read's* case (5), says, at p. 574:

> I respectfully agree with what Bowen, L.J., said in the *Mogul* case (7), when considering the difficulty that might arise whether there was sufficient justification or not [p. 618]: "The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell." I will only add that, in analyzing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach.

He agreed with Stirling, L.J., in holding that no such duty lay upon the defendant federation as justified them in acting as they did, but that a duty to interfere which might amount to justification could exist was, in their judgment, clear. Upon this case going to the House of Lords, this general proposition was reasserted, but it is to be observed that their Lordships were careful not to travel beyond the facts of the case before them. The Earl of Halsbury, L.C., refused to discuss cases where, upon moral or religious grounds, people may be justly advised to refuse to perform what they have agreed to do, and equally he refused to enter into a discussion of the duty or moral right to tender advice. Lord Macnaghten, while saying that he did not doubt that there might be justification for that which was in itself an actionable wrong, and that it would not be difficult to give instances putting aside altogether cases complicated by the introduction of moral considerations, did not give any such instances. Lord James accepted the proposition, but did not in this respect illuminate it. Lord Lindley, after dealing with the proposition that all that the officials of the federation did was to advise the men, and observing that it was not necessary to consider what a parent or guardian might do to protect his child or ward, and that it might be admitted that there were cases in which it was not actionable to exhort a person to break a contract, dismissed as untenable the proposition that the officials of the federation had such a moral or social duty to do their best for the men as justified their action.

In *Smithies* v. *National Assocn. of Operative Plasterers* (8), it was once again sought, but sought in vain, to justify the procurement of breaches of contract of service by workmen. It was there held that a *bona fide* belief on the part of the union that the employers were intending to evade a settlement of the dispute in accordance with the agreement, or even an actual intention on the part of the employers so to do, did not constitute justification for inducing the workmen to break their contracts. Again it was recognised that there might be justification, and Buckley, L.J., gave the familiar example of inconsistent contracts, but no other example. He added, however, this observation which bears upon the present case, at p. 337:

> The contention of the defendants here is: "We were entitled to induce Forrester to break his contract with you because you had broken your contract, as contained in the national agreement with us." This is setting up that, where there are two

> independent contracts, the breach of the one by the one party entitles a breach of the other by the other party. This contention, in my opinion, cannot be maintained.

In *Pratt* v. *British Medical Assocn.* (9), McCARDIE, J., sums up the authorities by saying that malice in the sense of spite or ill will is not an ingredient of the action, and, secondly, that no justification exists by reason of the fact that the defendants acted either for the advancement of their own trade interests or for the advancement of the interests of those with whom they were associated.

Thus the law stood when in 1924 RUSSELL, J., decided in *Brimelow* v. *Casson* (10) that the defendants, though they had procured the breach by a number of chorus girls of their contracts of service, had a sufficient justification for their action. After citing the passage from the judgment of ROMER, L.J., in the *Glamorgan Coal Co.* case (6), and after considering all the circumstances of the contracts which had been broken, RUSSELL, J., said, at p. 313 :

> These defendants, as it seems to me, owed a duty to their calling and to its members, and, I am tempted to add, to the public, to take all necessary peaceful steps to terminate the payment of this insufficient wage, which in the plaintiff's company had apparently been in fact productive of those results which their past experience had led them to anticipate.

In the 16 years which have passed since this decision, there has been, so far as I am aware, no case in which justification has been successfully pleaded.

In *De Jetley Marks* v. *Greenwood* (*Lord*) (11), PORTER, J., in regard to that plea says, at p. 873 :

> The justification must, I think, involve an action taken as a duty, not the mere protection of the defendant's own interests.

In *British Industrial Plastics, Ltd.* v. *Ferguson* (12), SLESSER, L.J., said that he thought that there might be justification, but this was not necessary to his decision, inasmuch as it was not established that the defendants knew that they were procuring a breach of contract, and such knowledge is a necessary ingredient of the tort.

In addition to these, which are the only relevant English authorities of which I am aware, there is a large body of American cases on this branch of the law, but, instructive though they are, I do not think that I can usefully refer to them. The result which plainly emerges is that it is for the defendant to justify, and that his task is a difficult one.

In the present case, if I rightly understand his argument, counsel for the defendants has pleaded that the defendants are justified in their otherwise actionable wrong on two grounds—namely, (i) that they and those whom they would persuade to break their contracts have a common interest in making the landlord perform his obligations, and (ii) that there is such a state of affairs here existing—that is, on the one side tenants who are weak and on the other landlords who are strong, and take advantage of their strength—that it is justifiable for the defendants to use a weapon which would otherwise be wrongful.

In my judgment, there is no validity in either of these contentions. The defendants owed no duty to their fellow-tenants. They sought their co-operation for their own ends, though no doubt a successful campaign would have been for the benefit of all alike. The end which they sought—namely, the performance by the landlord of his obligations—was one which could be reached by process of law. If the landlord broke his contract, the law gave them their remedy by way of damages, or, in a proper case, by way of specific performance. There is neither reason nor authority for the suggestion that in such circumstances a common interest can justify the interference with contractual rights. If A, B, C and D meet together and agree that, in order to persuade or coerce X to a certain course, they will each break their contracts with him, that, I apprehend, is an actionable conspiracy. It would be a strange thing if A, calling together B, C and D, and urging them to break their contracts, could justify that act on the ground of common interest. In my judgment, this contention must fail.

The second contention was one which appeared to be directed less to my reason than to my emotions. The case was put as somewhat analogous to *Brimelow* v. *Casson* (10), in which any step which put an end to an intolerable position might be regarded as justifiable. *Brimelow* v. *Casson* (10) stands alone, and has been the subject of a good deal of controversy. In a comparable case, it would be my duty to follow it, though I would humbly suggest that, on the facts stated in the judgment, that case might have been simply disposed of by the application of the maxim *ex turpi causa non oritur actio*. However that may be, though, there is no real analogy between the two cases. It is a dangerous proposition that inequality in wealth or position justifies a course otherwise actionable, and that tenants may adopt measures of self-help against their landlord because, in their judgment, the law does not afford them adequate remedy for his default.

I would only add, in deference to the argument addressed to me, which I think was intended to be founded on *Brimelow* v. *Casson* (10), that neither that case nor any other case supports the view that those who assume the duty of advising the withholding of rent or any other breach of contract can justify their action by protesting that they are performing a public service. Advice which is intended to have persuasive effects is not distinguishable from inducement, and there is no reason to suppose that the giving of such advice is justifiable except by those persons in whom the law recognises a moral duty to give it. In the result, I hold that the defendants without justification interfered with the plaintiffs' contractual rights, and it is clear that, at the date of the issue of the writ, they intended to continue to do so. I must, therefore, grant an injunction as asked.

The plaintiffs further claim damages upon the footing that they have suffered some loss by the withholding of rent by the tenants induced thereto by the defendants, but they say that they will be content with a nominal sum. Upon this footing, I award them £1 damages, and I order the defendants to pay the costs of the action, the motion being, by consent, treated as the trial of the action.

Injunction granted, and damages of £1 awarded to the plaintiffs.

Solicitors: *Phœnix, Levinson, Walters & Shane* (for the plaintiffs); *S. Seifert & Co.* (for the defendants). A

[*Reported by* Charles Newton, Esq., *Barrister-at-Law.*]

BOND *v.* NORMAN. BOND *v.* NOTTINGHAM CORPORATION. B

[Court of Appeal (Sir Wilfrid Greene, M.R., MacKinnon and Clauson, L.JJ.), **March 5, 6, 1940.**]

Easements—Support—Interference—Demolition of adjoining house by corporation in pursuance of clearance order—Liability of corporation—Housing Act, 1936 (*c.* 51), *s.* 26. C

The appellant corporation intimated to the respondent that they intended to demolish certain property included in a clearance scheme, owing to the failure of the owner to demolish the same. The respondent, the legal owner of an adjoining house, was entitled to a right of support for that house from the property ordered to be demolished. The corporation claimed that, as they were performing a statutory duty, they D were entitled to disregard the rights of an adjoining owner and to demolish the property comprised in the clearance area without providing equivalent support for the respondent's house:—

Held: on the true construction of the Act, the corporation, in demolishing the property in pursuance of their statutory powers, had power to demolish it only because the owner of the property had failed to do so, and they were in the same position as the owner, and, therefore, E under an obligation to provide equivalent support for the respondent's house.

Decision of Simonds, J. ([1939] 3 All E.R. 669) *affirmed.*

[**EDITORIAL NOTE.** In previous proceedings, it was held that the owner of the house to be demolished was bound to have regard to the right of support vested in the adjoining owner. The question here is whether the local authority were F under a similar duty when exercising their statutory power to enter and demolish the property included in the clearance order. It was held by Simonds, J., and that decision is here affirmed by the Court of Appeal, that the local authority must have regard to the easement of support, and, if they proceed to demolish the premises in accordance with the order and their statutory powers, they must provide equivalent support for the plaintiff's building. G

As to Interference with Easement of Support, see HALSBURY, Hailsham Edn., Vol. 11, pp. 368, 369, paras. 647, 648; and for Cases, see DIGEST, Vol. 19, pp. 173, 174, Nos. 1230-1233.]

Cases referred to:

(1) *A.-G.* v. *Horner* (1884), 14 Q.B.D. 245; 42 Digest 743, *1679*; 54 L.J.Q.B. 227; *on appeal* (1885), 11 App. Cas. 66. H

(2) *Colebeck* v. *Girdlers' Co.* (1876), 1 Q.B.D. 234; 19 Digest 173, *1223*; 45 L.J.Q.B. 225; 34 L.T. 350.

(3) *Jones* v. *Pritchard*, [1908] 1 Ch. 630; 19 Digest 43, *229*; 77 L.J.Ch. 405; 98 L.T. 386.

(4) *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557; 19 Digest 20, *68*; 71 L.J.Ch. 791; 87 L.T. 381.

(5) *Peyton* v. *London Corpn.* (1829), 9 B. & C. 725; 19 Digest 170, *1190*; *sub nom. Peyton* v. *St. Thomas's Hospital* (*Governors*), 7 L.J.O.S.K.B. 322.

(6) *Dodd* v. *Holme* (1834), 1 Ad. & El. 493; 19 Digest 169, *1177*.

(7) *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; 13 Digest 401, *1230*; 50 L.J.Q.B. 353; 44 L.T. 653.

(8) *Swainston* v. *Finn & Metropolitan Board of Works* (1883), 52 L.J.Ch. 235; 11 Digest 137, *241*; 48 L.T. 634.

(9) *Geddis* v. *Bann Reservoir* (*Proprietors*) (1878), 3 App. Cas. 430; 13 Digest 399, *1223*.

(10) *Public Works Comr.* (*Cape Colony*) v. *Logan*, [1903] A.C. 355; 11 Digest 109, case *k*.

(11) *East Fremantle Corpn.* v. *Annois*, [1902] A.C. 213; 13 Digest 401, *1236*; 71 L.J.P.C. 39; 85 L.T. 732.

APPEAL by the defendant corporation from an order of SIMONDS, J., dated July 19, 1939, and reported [1939] 3 All E.R. 669. The plaintiff in this action died while the judgment of SIMONDS, J., was being considered, and the suit was revived by adding his legal personal representative. SIMONDS, J., made an order restraining the defendant corporation from demolishing certain cottages situate in Aspley Place, Alfreton Road, Nottingham, so as to remove the support afforded to the property of the plaintiff without providing equivalent support in its place. The defendant Norman is the owner of the cottages in question.

C. E. Harman, K.C., and *Wilfrid M. Hunt* for the appellants.

J. Neville Gray, K.C., and *E. J. Rimmer* for the respondent.

Harman, K.C.: If the decision of SIMONDS, J., is correct, the corporation are under an obligation to provide equivalent support to the respondent's property before they may take down the cottages which adjoin that property. It is a little difficult to know what is meant by equivalent support and how long it is to last. The corporation is to provide that support on land which is not theirs. If the right of support has been acquired by prescription, it is necessary to show that there are circumstances which brought it to the knowledge of the owner of the servient tenement that the right was being acquired. The Housing Act, 1936, s. 26, states the duty of the local authority. The only duty of the corporation under the statute is to demolish. An obligation to shore up adjoining property cannot be implied from that. Shoring up is not a necessary incident of demolition. If the corporation had bought the adjoining property, compensation in respect of an easement would have been payable, by reason of the provisions of sect. 46 of the Act. It is a curious feature of the right to support that it is not a perpetual easement. The servient owner has to provide support only so long as his building remains standing. He may, however, allow it to fall down. The right of support then goes. This is shown by *Colebeck* v. *Girdlers' Co.* (2) and *Jones* v. *Pritchard* (3). In order to obtain an easement of support, it is not enough to show enjoyment for 20 years. There must also be something by which notice of the fact is given to one's neighbour: *Union Lighterage Co.* v. *London Graving Dock Co.* (4). In the absence of an easement, there is no obligation to shore up an adjoining house: *Peyton* v. *London Corpn.* (5) and *Dodd* v. *Holme* (6). No action can lie against a public body for doing that which it is required by statute to do: *Metropolitan Asylum District* v. *Hill* (7). There is nothing in the Housing Act, 1936, which preserves the rights of the respondent, and therefore it must be assumed that they are taken away: *Swainston* v. *Finn & Metropolitan Board of Works* (8). The legislature has made no provision for the payment of compensation in cases where the local authority does not purchase.

Hunt: If Norman's house were to fall down, the easement of support claimed by the respondent would go with it, subject to any rights he may have to repair. The legislature has said that the house is not fit to exist, and it directs the local authority to pull it down. The statute under which the local authority is directed to demolish the house says nothing about providing support to an adjoining house. The statute provides that all the materials are to be sold, and all that the local authority can recover from the owner of the property demolished is the expense of demolition. There is an obligation upon the local authority to act promptly. If the owner does not demolish the property within the time allowed, including any extended time, the local authority must demolish. The local authority has no machinery by which it can investigate the title to the property or go into its past history. Consequently, if the decision of SIMONDS, J., is correct, and the local authority demolishes without providing support, the owner of the adjoining property may have a right of action against them, if there should happen to be an easement. The local authority, however, would have no right to recover against the owner of the property demolished.

Gray, K.C.: There is no question, in this case, of the collapse of the property. The only question is whether or not a person is entitled to be compensated if rights are taken away. If the local authority were buying the site, under the provisions of the Housing Act, 1936, s. 46, they would have to pay compensation in respect of rights which were extinguished. The essential thing is to ascertain the intention of the legislature. In the present case, the intention is made clear by the preamble to the Housing Act, 1930. The Housing Act, 1936, has the same object as that of the Act of 1930, as is apparent from a consideration of it. The legislature, when providing for clearance, does, in the public interest, disregard the right of the owner in a degree. There is nothing in the Act, however, to indicate that Parliament intended to take away the rights of anybody except a person who comes within the terms of the Act. No Act of Parliament takes away rights by implication, unless it is impossible to arrive at any other conclusion from the terms of the Act itself. Nothing is said as to the rights of owners of adjoining property, except in sect. 46. If an owner who is ordered to demolish does not do so, the local authority must demolish the property in question. They must, however, demolish the property properly, and with regard to the rights of owners of adjoining property. "Demolish" means "demolish having regard to the rights of adjoining owners": *Geddis* v. *Bann Reservoir* (*Proprietors*) (9). It would be negligence to pull down the property in question without giving to the adjoining property the support to which that property is entitled: *Geddis* v. *Bann Reservoir* (*Proprietors*) (9). Unless it is driven to it, the court will not decide that, when the legislature takes away a man's rights, it takes them away without giving him compensation: *A.-G.* v. *Horner* (1). The words of Sir William Brett, M.R., in *A.-G.* v. *Horner* (1) were repeated and emphasised by the Privy Council in *Public Works Comr.* (*Cape Colony*) v. *Logan* (10). If the contention of the appellant corporation is right, the effect would be to make a present of the respondent's rights to the owner of the property which is to be demolished. The respondent would be deprived of his right of support, and the owner of the property to be demolished would be relieved of liability.

Harman, K.C., in reply: The corporation cannot be bound by the decision of the court given against the owner of the property to be demolished, because the corporation is not his agent. The corporation must do the work as the person who has been appointed by Parliament to do it. A wall cannot be left standing in order that it may give support to adjoining property, because the Act requires the buildings on the clearance area to be demolished and their materials to be sold. It would be putting a great burden upon local authorities if the Act were to be construed in the way proposed. [Counsel referred to *Geddis* v. *Bann Reservoir* (*Proprietors*) (9) and *East Fremantle Corpn.* v. *Annois* (11).]

Sir Wilfrid Greene, M.R.: I find myself in agreement with the conclusion of Simonds, J., and with the reasons on which it was based. I shall accordingly confine myself to making a few observations which are suggested by the arguments which we have heard. In dealing with a matter of this kind, it is legitimate—and, in fact, necessary—to consider the consequences of the one construction of the Act of Parliament and of the other construction, for the purpose of seeing whether or not one of those constructions runs counter to certain principles which the legislature *prima facie* is supposed to follow. The most relevant consideration in this particular case is that which was stated in a well-known passage by Sir William Brett, M.R., in the Court of Appeal in *A.-G.* v. *Horner* (1), at p. 257, which is quoted by Simonds, J., in his judgment, at p. 671:

> . . . it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it.

It is not disputed in the present case that the construction contended for by the appellants would result in interfering with the plaintiff's rights without compensation, but it is said that the language of Parliament is so clear that we are obliged to construe it as having that result.

I think that the admitted fact that the appellants' construction will produce that consequence will bear a little addition. The legislation is complicated, but it is not merely that on that construction the plaintiff will be deprived of his rights without compensation, but that that deprivation, according to that construction, will be of a peculiarly capricious character. I say that for this reason. There are in the Housing Acts concerned—the Act of 1936 is the one to which it is convenient to refer—alternative methods by which a local authority can secure the elimination of buildings which, for the reasons stated in the Act, it is considered desirable to eliminate. One is by an order for the demolition of the buildings in the area, and the other is by purchase by the local authority itself. That purchase may be either by agreement or it may be compulsory. I need not concern myself with the purchase by agreement, but, where the particular choice of the local authority falls upon compulsory purchase, the Act provides for the extinction of easements affecting land purchased, and also for the giving of compensation to the persons entitled to the easement. It is a perfectly intelligible scheme, under which Parliament, for good reasons, takes away a man's rights, but provides for compensation.

Note, however, how different are the consequences if the local authority makes the other choice, and determines to proceed by a clearance order. It is contended that, whether it is the owner or the local authority who does the work consequent upon the making of the clearance order, they are both entitled, in effecting the necessary demolition, to disregard entirely the right of the owner of the easement, which in this case is an easement of support. If the proceeding is by means of a clearance order, the owner of the building, if he demolishes, or the local authority, if it demolishes, can get rid of that easement, or, at the least, according to the argument of counsel for the appellants, can so seriously affect the position of the proprietor of the easement that he has either to allow his house to collapse or himself at his own expense to set up the necessary support.

For the purposes of the consideration to which I am directing my remarks, it matters not which of these two things be right, because in each case the right of the owner of the easement is seriously affected. Accordingly, it would appear that Parliament has produced the result —which I cannot characterise as other than capricious—of giving to the owner of the easement compensation if the local authority chooses to take one course, and depriving him of compensation if it chooses to take the other. If Parliament has so decreed, well and good, but no intelligible reason has been suggested to us why Parliament should have drawn a distinction of that character between the two cases, thus leaving it to the decision of the local authority to take a course which may or may not affect the rights of the owner of the easement without consulting him. That is a consideration which I think it is legitimate to take into account.

There is a further matter, however, which bears upon the same argument, and it is this. Whichever of the two courses the local authority is minded to adopt—namely, clearance order or purchase—the Act provides for a hearing of certain persons at which they can urge their objections to the taking of whichever course is decided upon. The persons entitled to take objections are the owner, who in the Act is defined as the owner in fee, lessee, occupier (but excluding tenants for a month or less), and, if possible to ascertain such persons, every mortgagee. Those provisions will be found in the first and third schedules to the Act. If the inquiry is one relating to a proposal for compulsory purchase, those persons are entitled to appear and be heard. On the other hand, the owner of the easement is not entitled to be heard. He does not belong to any of the classes the members of which are regarded by the legislature as proper persons to be heard in opposition. The fact that he is excluded from taking part in such an inquiry may be galling to him, but he has the consolation at any rate of knowing that, although the effect of the order will be to extinguish his easement, he will get compensation for the loss so suffered. Very different is the position where the inquiry is one which relates to a clearance order. In that case, as in the other case, the owner of the easement is excluded from the room, but in that case his position is doubly galling, because he knows that, not only is he given no opportunity to state his objections, which may be very serious, but also he is faced with the situation that, without his having been heard at all, his easement, or whatever it may be, is going to be taken away from him, or, at the lowest, he is going to be subjected to expense in making it effective without one penny of compensation being given to him. There, again, I cannot help thinking that there would be some capriciousness in the Act of Parliament if that were the consequence.

I mention these matters because it seems to me that, if the appellants' construction is right, they do form an aggravation of the simple case of taking away property without compensation, because they mean that the process of taking away that property (or compelling the owner at his own expense to preserve it) without compensation shows, when compared with the other provisions of the Act, a complete inconsistency for which no reasons can be suggested.

Armed with those considerations, it becomes necessary to approach the construction of the Act itself. The question lies in the smallest possible compass, and turns ultimately upon the meaning of one word, read, of course, in the context in which it is found, and in the light of the Act of Parliament as a whole. Counsel for the appellants did not accept the view that Norman, the owner of this building, was under any obligation, if he had carried out the demolition, to provide alternative support for the plaintiff's houses, but he said, and very fairly said, that, even if Norman was under an obligation of that character, such obligation did not extend to the local authority, because, in construing the language used in reference to the duties imposed on the local authority, it is unnecessary to consider the nature of the duties in the case of Norman. I think that the proper way of construing the more immediately relevant section—namely, sect. 26—is to consider, in the first place, the powers and duties of the owner. It is to be noticed that the obligation imposed on the owner is in terms the same as that imposed upon the corporation. The words are "shall demolish." When I consider the position of Norman, confronted, on the one hand, with the existence of the right of support vested in his neighbour, and, on the other, with the direction of an Act of Parliament which tells him that he shall demolish the building which provides the support, it seems to me that, in construing the language of the Act of Parliament, he is bound to construe it in relation to the existing state of affairs as between himself and his neighbour. In that relationship, Norman is not the owner of a building free from any rights in other persons. He is the owner of a building which is the subject of a real right in a neighbour, which qualifies and cuts down the plenitude of his ownership.

The nature of the right of support is not open to dispute. The owner of the servient tenement is under no obligation to repair that part of his building which provides support for his neighbour. He can let it fall into decay. If it does so, and support is removed, the owner of the dominant tenement has no cause for complaint. On the other hand, the owner of the dominant tenement is not bound to sit by and watch the gradual deterioration of the support constituted by his neighbour's building. He is entitled to enter and take the necessary steps to ensure that the support continues by effecting repairs and so forth to the part of the building which gives the support. What the owner of the servient tenement is not entitled to do, however, is by an act of his own to remove the support without providing an equivalent. There is the qualification upon his ownership of his own building that he is bound to deal with it subject to the rights in it which are vested in his neighbour, and can deal with it subject only to those rights.

If one takes the case of a person in that situation, what is the proper construction of an Act of Parliament which directs him to demolish his building? It seems to me that, when it is borne in mind that one construction will result in doing the thing which must not be done, according to what Sir William Brett, M.R., said in *A.-G.* v. *Horner* (1), and the other construction will not, then the only construction which we ought to put upon the words is one which, without—in my view, at any rate—doing any violence to the language, will avoid the consequence referred to by Sir William Brett, M.R., and will resolve the difficulty. It seems to me that, when the owner of the servient tenement demolishes his building in such a way as to affect his neighbour's right and let down his neighbour's house, he may properly be said to be doing something more than merely demolishing his building. He is not merely dealing with what is his. He is dealing with what is not his. He is demolishing his building, and, at the same time, affecting what the law recognises as a right of his neighbour in that building.

In those circumstances, it appears to me that the proper construction to put upon the word "demolish" involves that the manner of demolition must be such as not to interfere with the neighbour's rights. That does not mean that the demolition is necessarily to stop short at the point where the existing building begins to provide support, for the reason that it is not the right of the owner of the dominant tenement to insist upon the maintenance of that individual and particular building. His right is given effect to, if that building is taken away, by providing that some substitute is put there for it. He is entitled to say to his neighbour: "Either you leave your building, or the necessary part of it, as it is, or, if you choose to pull it down, you must provide a substitute."

In this case, Norman being confronted with that alternative, it seems to me that the method of demolition which he is ordered to carry out must be one which gives effect to the rights of his neighbour, which he can do, and consistently with the direction of the Act of Parliament may very well be bound to do, by taking down the whole of his building and providing the necessary support. I see no difficulty myself in regarding the totality of these operations as falling within the general process of demolition.

If that view as to Norman's position be right, I am quite unable to discover any reason why demolition by the local authority should be affected by any different rule. The local authority is put there to perform a duty primarily imposed upon the owner, but not carried out by him. It is when he makes default in the duty of demolition that the local authority has imposed upon it the same duty of demolition, no more and no less. It seems to me that to construe this Act of Parliament as giving to the duty of the local authority in demolishing a quality different from that which is found in the case of the owner would be quite unjustifiable. Accordingly, in my opinion, both the owner and the local authority—whose position, without attempting any particular accuracy, for convenience I venture to describe as that of a statutory contractor—are under an obligation to adopt that method of demolition which will not interfere with the right of the plaintiff in respect of the building to be demolished and the support to be derived from it.

It was suggested in the argument that the true effect of the Act of Parliament is, so to speak, to substitute a statutory destruction of the building for a destruction which might take place by the processes of time. The local authority was likened to a statutory executioner, to whom was committed the duty of bringing that process about. That imagery is picturesque, but, in my opinion, misleading. I see no reason at all for importing into the construction of this Act of Parliament any such idea as that of a sort of statutory decay or statutory execution. It seems to me that the language of the Act of Parliament can be interpreted without indulging in such fancies.

Other matters referred to were the difficulties in which the local authority, not being the owner of the land, would find itself in ascertaining whether or not an easement existed. It is very unfortunate, no doubt, but such risks and difficulties have to be faced every day, not merely by local authorities, but also by other owners of property. I can see no reason for giving to this Act of Parliament an interpretation which would relieve them of what may be a troublesome and difficult investigation at the expense of the unfortunate neighbouring owner, whose rights on that view would be affected. For these reasons, as well as for those given in the judgment of SIMONDS, J. (which, in my view, is sufficient in itself to dispose of this case), the appeal, in my opinion, fails, and must be dismissed with costs.

MACKINNON, L.J.: I agree. After the careful judgment of the judge in both parts of the case, in the Norman case and in the case of Nottingham Corporation, now amplified by the judgment of SIR WILFRID GREENE, M.R., I do not think that I should serve any useful purpose by adding anything.

CLAUSON, L.J.: I agree.

Appeal dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *J. E. Richards*, Town Clerk, Nottingham (for the appellants); *Peacock & Goddard*, agents for *Hunt, Dickins & Willatt*, Nottingham (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MELLOR AND OTHERS *v.* AUSTRALIAN BROADCASTING COMMISSION.

[PRIVY COUNCIL (Viscount Maugham, Lord Porter and Sir George Rankin), **January 23, 25, February 22, 1940.**]

Privy Council—Australia—Copyright—Music—Infringement—Public performance by broadcast—Music stated by owners of copyright to be free for public performance—Copyright Act, 1911 (*c.* 46), *ss.* 1, 2, *Sched. I—Australian Copyright Act,* 1912 (*No. 20 of 1912*), *s.* 8.

The appellants carried on business as publishers of band music, and were the owners of the sole right of performing in public within Australia a large number of musical works arranged for brass and military bands. They published every year a pamphlet containing a statement of the terms or prices for purchase of their music, and also containing statements saying, *inter alia*, "We have paid for the performing rights of every piece we issue," "All our music is free for public performance," "We make one price cover both the music and the performing rights thereof" and other similar statements. The respondents, who were a corporation authorised by statute to provide and broadcast programmes in Australia, broadcast some of the appellants' music played by bands who, or the members of whom, had purchased the pieces on the terms set out in the appellants' pamphlets. The Copyright Act, 1911, subject to modifications not here material, is in force in Australia. The appellants alleged infringement of their copyrights :—

HELD : the licence or consent given in the pamphlets included broadcasting by bands, and there was no infringement.

[**EDITORIAL NOTE.** The question here is the extent of the licence given by the statements in the pamphlets. It was contended that the licence did not extend to a broadcast performance, but it is held that, if this limitation was intended, it should have been expressly stated.

AS TO LICENCE TO PERFORM COPYRIGHT WORKS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 550-552, paras. 861-865 ; and FOR CASES, see DIGEST, Vol. 13, p. 197, Nos. 313-323.]

Case referred to :

(1) *Performing Right Society, Ltd.* v. *Hammond's Bradford Brewery Co., Ltd.*, [1934] Ch. 121 ; Digest Supp. ; 103 L.J.Ch. 210 ; 150 L.T. 119.

APPEAL from a judgment of NICHOLAS, J., dated Dec. 10, 1937, in the Supreme Court of New South Wales in its equitable jurisdiction. The facts are fully set out in the judgment of their Lordships delivered by VISCOUNT MAUGHAM.

D.P. Maxwell Fyfe, K.C., and *Hartley Shawcross, K.C.*, for the appellants.

R. F. Roxburgh, K.C., and *Wilfrid M. Hunt* for the respondents.

VISCOUNT MAUGHAM : This is an appeal from a judgment of NICHOLAS, J., in the Supreme Court of New South Wales in its equitable jurisdiction. By the judgment, which was delivered on Dec. 10, 1937, the judge dismissed the action, which was brought by the appellants against the respondents, and was founded on alleged infringements of copyright in Australia during 1932 and 1933.

By the Australian Copyright Act, 1912 (No. 20 of 1912), s. 8, it is provided that the British Copyright Act (the Copyright Act, 1911) should, subject to any modifications provided by the Australian Act, be in force in the Commonwealth, and should be deemed to have been in force therein as from July 1, 1912. So far as affects the action and this appeal, no modifications are material. The appellants carry on in partnership a business in England under the name of Wright & Round as publishers of band music, and they were at the material times owners of the sole right of performing in public within the Commonwealth a large number of musical works arranged for performance by brass and military bands. They publish each year a pamphlet described as a BAND JOURNAL which contains a statement of the terms or prices for purchase of the music of their pieces, and long lists of these pieces and of the parts required for their performance by bands and soloists. It may be mentioned that some of the pieces are arrangements of well-known operas and other works and songs, and others are described as being original compositions. The pamphlet or journal also contains certain statements or guarantees as to the performance of the pieces, which will be stated later. It will be found that this appeal depends on the meaning and effect of these statements.

The respondent is a corporation constituted under the Australian

Broadcasting Commission Act, 1932, and is authorised by law to provide and broadcast throughout the Commonwealth from broadcasting stations known as national broadcasting stations adequate and comprehensive programmes, and to take, in the interests of the community, all such measures as, in its opinion, are conducive to the full development of suitable broadcasting programmes.

There is no dispute about the facts. The respondents during the years in question were in the habit of engaging bands to play some of the copyright works of the appellants in studios, or sometimes in other places, with a view to the broadcasting of the performances. The bands, or the members of the bands, had purchased the pieces on the terms, and with the guarantees, set out in the appellants' pamphlets or journals. The respondents always approved the programmes of the bands before the performances. The actual broadcasts by the bands were effected in the manner now usual in such cases. There was a microphone placed in position to receive the sounds and to transmit them to modulating and amplifying equipment belonging to the respondents in their control room. Thence the sounds were carried by land line to the respondents' transmitting station, where, after again passing through modulating and amplifying equipment, there was a transmission by electro-magnetic waves of a specific wave-length, which were picked up by receiving sets in different parts of the Commonwealth.

It was admitted by counsel for the respondents that there were performances in public of the works in question for which the respondents were responsible if, in the circumstances of the case, there was no consent by the appellants to such performances. The respondents, however, maintain that such consent was in fact given by the circulation to bands and band organisations and music sellers throughout the Commonwealth of the annual pamphlets above-mentioned. The pamphlets during the years in question contained (with an alteration of date for 1933) the following statements :

> PLEASE NOTE : All our music is FREE for Public Performance. To the Bands of the British Empire.
>
> Once more it is our privilege to offer you yet another issue, the 58th without a break, of the world-famous Liverpool Journal. All we said of the 1931 journal has been proved to be true by the record sales of it. Thousands of bands have played it, and have thereby justified our assertion that it would be found to be the goods . . .
>
> The 1932 journal will be found equal to any of its predecessors. We have chosen it with the greatest care, from an enormous stock of manuscript scores we have selected a journal, which is all good, and balanced to meet the needs of every band . . .
>
> All our subscribers should note especially that all our music is "Free for Public Performance" anywhere. See our guarantees below, show them to your patrons, so that they may rest assured that none of our publications will bring them any trouble over "performing fees." We make ONE price cover both the music and the performing rights thereof, and the extent of our sales proves that bandsmen appreciate the equity of our policy . . .
>
> Relying on a continuance of your esteemed patronage and soliciting the favour of early orders.
>
> We remain,
> Yours faithfully,
> WRIGHT & ROUND.

IMPORTANT GUARANTEES.

WE GUARANTEE that every piece published in the L.J. can be played anywhere, by anyone without fear that any composer or society will pounce upon any Band for Performing Fees.

WE HAVE PAID for the performing rights of every piece we issue, and no Band will buy L.J. Music and discover later that they must not play it at an engagement without paying fees to someone else.

A WE GUARANTEE, also, to supply music (in accordance with the terms of subscription) to the value of £3 12*s.* 6*d.* (20 parts) for each subscription of £1 17*s.* 6*d.*

YOU WILL SEE THAT OUR PRICE INCLUDES NOT ONLY THE PRINTED MUSIC, BUT ALSO PERMISSION TO PLAY IT ANYWHERE, WITHOUT FURTHER PAYMENT. THIS FACT IS IMPORTANT TO YOUR BAND, AND TO EVERY BANDSMAN PERSONALLY.

Before we consider the meaning and effect of the statements and the
B guarantee, it is desirable to make some general observations. Musical copyright under the Act of 1911 is of a special character. Apart from the right to prevent the multiplication of copies of the piece of music—with which we are not concerned here—it comprises "the sole right to perform the work or any substantial part thereof in public" and
C to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed, and to authorise any of such acts (sect. 1). "Performance" is declared by sect. 19 to mean "any acoustic representation of a work." The copyright is deemed to be infringed by any person who, without the
D consent of the owner of the copyright, does anything the sole right to do which is by the Act conferred on the owner of the copyright (sect. 2). Nothing is said in the Act with regard to broadcasting, which is not surprising, having regard to the facts that wireless signal communication was then in its infancy, and that broadcasting of music (and of speech)
E as now practised was unknown.

It is, however, clear, and it is not in dispute, that the acoustic representation of a musical work by means of wireless, so that the musical work is heard many miles away from the transmitting studio or place of actual performance, is a performance (public or private) of the work
F within the meaning of the Copyright Act. It is nothing to the purpose that what is heard is the result of the use of various scientific instruments and appliances at the transmitting end, the transformation back into electric impulses at the receiving end, and the use of the receiver or loudspeaker, which finally converts the electric signals into sounds.
G The Act is concerned with the protection of authors, and is dealing with practical matters. The listeners at the reception end conceive themselves as listening to the musical piece as played in the distant studio, and they do not doubt that they are listening to a performance of that piece.

H Here it is necessary to remember that the sole right of the owner of the musical work is to perform it *in public*, and that anyone may perform the work in private. The original performance in the studio may be, and generally will be, a performance in private. In such a case, the broadcast performance at the receiving end, if in public and unlicensed, will be an infringement of copyright at that place: *Performing*

Right Society, Ltd. v. *Hammond's Bradford Brewery Co., Ltd.* (1). If there is merely a broadcast from the studio where the piece is performed in private, there is obviously no performance in public at all. A broadcast *per se* is not an *acoustic* representation of the work. If the broadcast is picked up only by listeners in private, it might be difficult to establish that there is a public performance, for each performance would A be separate, and each would be private. However, it is not necessary to express an opinion on this point. It cannot be doubted that a broadcast to all and sundry listeners in such a case as those with which we are dealing will include hotels and other places of entertainment or refreshment, which, if not forbidden, will perform the piece to a number of B members of the public, and it is clear that such a performance will be a public performance within the meaning of the Copyright Act by the owners or occupiers of those places, for their actions in connection with the receivers which have been installed there, and which they control, have caused the public performances to take place. Whether the studio C performance is public or private, if the persons who are responsible for that performance are also responsible for the broadcasting of the piece, there is no doubt that they have facilitated the performance of the work in public by any listener who is in a position to use a loudspeaker, and thus to perform the piece in public. The question as to the position D of the broadcasters in such a case, so far as regards infringement, is answered by the language of sect. 1 (2) of the Act. It is sufficient to show that they have "authorised" the performance in public of the works, and this will generally be established by proving that listeners with a licence were entitled to tune in their receivers, and thus to perform the E musical works in question in public as well as in private. The respondents, it may be added, did not attempt to limit the general right of the owners of receiving sets to private performances of these pieces. It was probably impracticable so to do. The respondents have admitted, as already stated, that there were performances in public for which they F were responsible unless they can rely on the consent or licence contained in the pamphlets above referred to. The terms of these documents must now be considered.

The trial judge has decided the question as to the true meaning of the pamphlets in favour of the respondents, holding that the language used G in the pamphlets was a consent to the public performance of the works by the respondents. Their Lordships have arrived at a similar conclusion. It is to be noted in the first place that the right to perform a musical piece by means of a broadcast is a right comprised in "the sole right . . . to perform the work . . . in public" conferred by sect. 1 (2) H of the Act. (See also Sched. I of the Act, where "performing right" has an equally wide meaning.) The appellants are now seeking to split this right into two for the purposes of construing their guarantee—namely, the exclusive right to perform to an assembled audience and the exclusive right to perform by means of a broadcast. Yet the words

"We have paid for the performing rights of every piece we issue" make no separation between these two rights. Nor do the words at the beginning of the extracts from the pamphlets above set out—namely, "All our music is free for public performance"—make such a distinction. The sentences "All our subscribers should note especially that all our music is 'free for public performance' anywhere" and "We make one price cover both the music and the performing rights thereof" enforce the argument that the appellants are not retaining for themselves any performing rights as against the persons who subscribe for, or buy, the musical pieces published by the appellants. Taken as a whole, the extracts above set forth seem to their Lordships to guarantee complete freedom from trouble as to copyrights to bands who, having bought the music published by the appellants, play the musical works in public. As the judge remarked, the appellants "must have known that band performances were frequently broadcast." If they desired to exclude such broadcasting—included as it is in the statutory "performing right"—it was for them to exclude it.

Their Lordships are, therefore, of opinion that the licence or consent given in the pamphlets included the broadcasting by bands, with any necessary consequences of such broadcasting, such as the use of receivers by persons entitled to use them. It follows that the respondents were entitled to engage bands to do these permitted things, and have not committed a breach of the appellants' performing rights by "authorising" the bands to do them. For these reasons, their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Blundell, Baker & Co.* (for the appellants); *Routh, Stacey & Castle* (for the respondents).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

BROWN *v.* SHERWOOD COLLIERY CO., LTD.

[COURT OF APPEAL (Slesser, Luxmoore and Goddard, L.JJ.), **February 13, 28, 1940.**]

Workmen's Compensation—Industrial disease—Order of registrar for reference to medical referee—Order of judge dismissing appeal therefrom—Whether orders of registrar and judge final or interlocutory—Workmen's Compensation Act, 1906 (*c.* 58), *Sched. I, para.* 15—*Workmen's Compensation Act,* 1923 (*c.* 42), *s.* 11—*Workmen's Compensation Act,* 1925 (*c.* 84), *ss.* 17, 18, 19—*Workmen's Compensation Rules,* 1913-1924, *rr.* 57, 76—*Workmen's Compensation Rules,* 1926, *r.* 1 (2)—*C.C.R.,* 1903-1922, *Ord.* 12, *r.* 11.

A workman suffered from pain, which he attributed to an old injury incurred in his employment with his employers, the appellants. He therefore asked the employers to agree to a reference to a medical referee, but they refused, whereupon he obtained a report from his own doctor, and then applied to the registrar, who made an order for reference. The employers appealed, and the judge made an order dismissing the appeal with costs. The registrar then taxed the costs on the basis that the judge's order was a final order. The employers thereupon applied to the judge for a review on the ground that the order was an interlocutory one. The judge held that the order was final, and from that decision the employers appealed :—

Held : the decision of a judge in allowing or dismissing a reference to a referee is no more than a determination of the manner in which evidence is to be adduced, and does not finally determine the rights between the parties as to the liability to pay compensation so as to A make an order thereon final. In the present proceedings, the costs should be taxed on the basis that the order made by the judge in dismissing the appeal and the order made by the registrar on the application for reference were interlocutory orders.

[EDITORIAL NOTE. Three different tests have been proposed for determining whether an order is final or interlocutory. The weight of authority is in favour B of the simple test stated in the following question : Does the order, as made, determine the dispute ? In this question, the dispute means the whole matter in issue between the parties, and an order which is merely conclusive of a subordinate issue is not a final order.

As to Final and Interlocutory Orders, see HALSBURY, Hailsham Edn., Vol. 19, pp. 206-210, para. 508 ; and for Cases, see DIGEST, Vol. 30, pp. 128-130, C Nos. 61-81. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 1288-1291.]

Cases referred to :

(1) *Burton* v. *Dobson Ship Repairing Co., Ltd.*, [1938] 3 All E.R. 410 ; Digest Supp. ; 31 B.W.C.C. 294 ; *affd.*, [1939] 3 All E.R. 431. D

(2) *Sapcote & Sons* v. *Hancock* (1911), 4 B.W.C.C. 184 ; 34 Digest 376, *3053*.

(3) *Re Reeves (Herbert) & Co.*, [1902] 1 Ch. 29 ; 30 Digest 135, *138* ; 71 L.J.Ch. 70 ; 85 L.T. 495.

Appeal by the employers from an order made by His Honour Judge Hildyard, at the Mansfield County Court, dated July 10, 1939. The E facts are fully set out in the judgment of Slesser, L.J.

Neil Lawson (with him *F. W. Beney*) for the appellants.

F. A. Sellers, K.C., and *T. T. Dineen* (with him *Norman Winning*) for the respondent.

Lawson : The judge's order was not a final order, because it did not, F in accordance with the tests laid down by the authorities, finally determine the rights of the parties as to the matters in dispute. The dispute between them was the workman's claim for compensation under the Act, and the procedure under sect. 19 was mere machinery for the purpose of obtaining evidence on a part of the subject-matter of the G dispute—namely, the workman's capacity for work, and how far his incapacity was due to the accident. The judge was wrong in saying that, having regard to the result of the reference, the order was a final order. In order to test the nature of the order, the order itself as it stands, and not its results, must be looked at. Nothing that the judge H or the registrar ordered affected finally the rights of the parties.

Sellers, K.C. : As no other proceedings were pending before the court in relation to the claim for compensation, the judge's order must be treated as a final order, because it determined the only matter in dispute in any legal proceedings between the workman and his employers. Alternatively, the procedure outlined by sect. 19 is quite independent of, and distinct from, an arbitration under the Act. Therefore, when a matter comes to court under that section, it is the only dispute between the parties, and in this case the order effectively determined the matter.

SLESSER, L.J.: The appeal in this case under the Workmen's Compensation Acts is concerned solely with the basis on which certain costs should be taxed by the registrar in the county court, but, as the decision must affect a large number of cases, we have thought fit to reserve our judgment. The problem to be considered arises in this way. In Jan., 1917, a workman, George Brown, met with an accident while in the employment of the Sherwood Colliery Co., Ltd. For a time he was incapacitated, and received compensation, but later he returned to work. An attack of nystagmus intervened, out of which nothing now arises, but in Feb., 1939, he suffered pain in his back, and, thinking that it was due to the original accident, he asked the employers to agree to a reference to a medical referee. The employers refused, and on Feb. 11, 1939, the workman was examined by his own doctor, who duly certified, in substance, that the man was fit for light work only. This statement was sent to the employers, who denied that the man was suffering from incapacity arising from the accident of 1917. Thereupon the workman applied to the registrar under the Workmen's Compensation Act, 1923, s. 11, for a reference to a medical referee. The registrar made the order for reference, but the employers appealed from that order to the judge, asking him to refuse to allow the reference. On that appeal, the employers failed, and the judge made an order dismissing the appeal with costs. It is these costs which are the subject of the present litigation.

The registrar proceeded to tax them upon the basis that the judge's order was a final order. The employers thereupon applied to the judge for a review, alleging that the order made by the judge when he dismissed the appeal from the registrar's order of reference was an interlocutory order. The judge held that the order was final, and from that decision the employers now appeal to this court.

The Workmen's Compensation Rules, 1926, r. 1 (2), provide that the Consolidated Workmen's Compensation Rules, 1926, now extant, made under the Consolidation Act, 1928, shall not apply to any case where an accident happened before Jan. 1, 1929, so that this case is governed by the then-existing rules. By sect. 50 (1) of the 1925 Act, that Act similarly does not apply to any case where the accident happened before that date, but the enactments in Sched. IV, under which the present proceedings were brought, continue to apply. It is this which makes it necessary that the present case shall be considered under the Workmen's Compensation Act, 1906, Sched. I, para. 15, as amended by the Workmen's Compensation Act, 1923, s. 11. However, in my judgment, were this case to have been brought under the consolidating Act of 1925, ss. 17, 18, 19, and the Workmen's Compensation Rules, 1926, which are the corresponding provisions, the result would have been the same. I arrive at this conclusion because, apart altogether from any special rules of the county court previous to 1926 stating that such an order as the judge here made is interlocutory, on general principles, I think it is of an interlocutory nature.

I now deal with the special rules here applicable. First, the Workmen's Compensation Rules, 1913-1924, r. 57, dealing with applications for reference to a medical referee under Sched. I, para. 15, provides that, where application is made by any one of the parties to a registrar and, on appeal to the judge, the respective authority, if of opinion that, owing to the exceptional difficulty of the case, or for any other sufficient reason, the matter ought to be settled by arbitration—these words are reproduced verbatim from sect. 11 of the 1923 Act, now sect. 19 (2) of the consolidating Act of 1925, and are the provisions on which the employers here relied in their appeal—shall refuse to allow the reference, and may, in such case, make such order as to the costs of the application as he shall think fit. By r. 57 (9), the costs of any application to the registrar—there is no mention of the costs of appeal to the judge—may be allowed by special order and in accordance with the provisions of C.C.R., Ord. 12, r. 11, so far as applicable. Ord. 12 deals with interlocutory proceedings, and, therefore, the costs of an application to the registrar are to be deemed to be interlocutory. By a parity of reasoning, the appeal to the judge from such interlocutory proceedings must also be interlocutory. However, as I have said, I do not come to this conclusion solely on a consideration of the particular rules under the repealed Acts of 1906 or 1923. Both under them and under sects. 17, 18 and 19 (the corresponding sections) of the consolidating Act of 1925, application for reference to a medical referee may arise when there is a question between the parties as to the liability to pay compensation, which, in default of agreement, may require arbitration. The need for a reference may arise either where a claim is made, which may be of an informal kind (*per* LORD PORTER in *Burton* v. *Dobson Ship Repairing Co., Ltd.* (1)), or where arbitration is pending, or where application is made after weekly payment, as under sect. 19 of the 1923 Act, now sect. 12 of the 1925 Act: see Form 49 made under both Acts and rules, where appropriate headings to meet all those contingencies are given. Clearly, before there is an issue as to liability, there is no right or duty in the workman to submit to medical examination. The order of the registrar or judge deciding whether or not there shall be a reference merely determines the manner in which the medical evidence as to the physical condition of the workman shall be established—whether finally and conclusively by a certificate of the medical referee, so that a judge at the arbitration cannot entertain evidence contradicting the report (*Sapcote & Sons* v. *Hancock* (2)), or whether the medical evidence, if the reference be refused, shall be adduced by oral testimony. The decision of the judge or registrar in dismissing or allowing the reference to the referee is, therefore, no more than a determination of the manner in which evidence is to be adduced. Emphatically it does not, in my judgment, finally determine the rights between the parties as to the liability to pay compensation, so as to make an order thereon final.

Had the registrar or judge in the present case acquiesced in the employers' contention, and so decided that the whole case should be proved before the court, and not certified by the medical referee, it could hardly have been argued that such an order would not have been interlocutory. The fact that, in this particular case, the judge dismissed the appeal and allowed the reference to continue cannot, in my opinion, make the order a final one. Even if the medical referee had decided in favour of the workman (which he did not), that would not conclude the case. It would still have been necessary for the workman to show that his medical condition so certified, unless admitted, was caused by an accident arising out of his employment for which the employer was in law responsible, and that his injury had so produced incapacity as to make the employer liable to pay compensation.

The present rule as to costs under the Workmen's Compensation Rules, 1926, is r. 76, which states that, where no provision as to scales of costs is made, reasonable costs may be allowed not exceeding more than is under the scales to be allowed in respect of proceedings of a like nature. The proceedings are now regulated by C.C.R., Ord. 47. The allowance of costs of and incidental to interlocutory applications is in the discretion of the judge, or of the registrar, if he hears the application, and, by C.C.R., Ord. 47, where the application is interlocutory, and costs are on the higher scale, no fee shall be allowed in respect of counsel unless the judge or registrar certifies that the application is fit for counsel. In my view, in the present proceedings the costs should be taxed on the basis that the order made by the judge in dismissing the appeal and the order made by the registrar on the application for reference were interlocutory orders. This appeal succeeds with costs.

LUXMOORE, L.J.: I agree that this appeal should be allowed. The question at issue relates to the taxation of the costs of an appeal to the county court judge from an order of the registrar of the Mansfield County Court referring to a medical referee the question of the condition or fitness for employment of a workman named George Brown, who was at all material times in the employment of the Sherwood Colliery Co., Ltd. The order was made under the provisions of the Workmen's Compensation Act, 1906, Sched. I, para. 15, and of the Workmen's Compensation Act, 1923, s. 11, at a time when no arbitration proceedings were pending. These provisions are applicable by reason of the Workmen's Compensation Act, 1925, s. 50 (2). The registrar taxed the costs in question. The employers requested a review of the taxation, on the ground that

the taxation should have been made on the footing that the proceedings
were of an interlocutory nature. The registrar held that the matter was
not an interlocutory one, and that the bill submitted for taxation was
properly drawn. The employers in due course applied to the county
court judge for a review. The county court judge upheld the order of
the registrar, and certified that the question raised was of general A
importance. He allowed the workman the costs of the application to
review on Scale C.

The employers appeal to this court on the grounds set out in the
notice of appeal. These grounds are (i) that the judge was wrong in
law in holding that an order for reference made by the registrar was not B
of an interlocutory nature, and (ii) that the judge was wrong in law in
holding that the question as to whether the order of the registrar was
final or interlocutory depended upon the effect of the medical referee's
certificate. It appears to me that there is an error in these reasons, for
the matter dealt with in the taxation was not the costs of the order of C
reference made by the registrar, but those of the appeal to the judge from
that order. The bill of costs submitted for taxation contains no item
relating to the application to the registrar, the first item on the bill being
instructions to oppose the employers' appeal to the judge from the
registrar's order for reference. D

In order to understand the question to be determined, it is necessary,
I think, to state quite shortly the history leading up to the application
to the registrar. It appears partly from the workman's application for
the reference and partly from the judge's notes. On Jan. 8, 1917, the
workman was injured by an accident arising out of and in the course E
of his employment. The injury sustained was a fractured sternum,
with depression of the bone. The workman was incapacitated for a
long period, but subsequently returned to his ordinary work. He left
his work later on account of an attack of nystagmus. This matter
has been dealt with, however, and there is no need to mention it further, F
for the workman subsequently returned to his ordinary work.

At the beginning of Feb., 1939, he complained of pain in his chest,
and alleged that it was the result of his first accident. The employers
were asked to agree to the joint appointment of a medical referee, but
they refused so to do. Accordingly, on Feb. 11, 1939, the workman was G
examined by a medical man selected by himself, who reported as
follows:

> He has an obvious depression of his sternum as the result of an accident sustained
> by him in 1917. The X-ray report shows an old united fracture and depression
> of this bone. In my opinion the limitation of movement and pain in his arm are
> due to stretching of muscles attached to his sternum. As to his working capacity, H
> he is in my opinion only fit for light work which does not entail lifting or stretching.
> A night watchman might suit him.

A copy of the report was sent to the employers in due course. The employers stated that they were unable to agree that the workman was suffering any incapacity from the accident to his chest.

The formal application for a medical reference was made by the workman on Feb. 22, 1939. This application was made under the Workmen's Compensation Act, 1906, Sched. I, para. 15, and the Workmen's Compensation Act, 1923, s. 11. The material provisions of para. 15 are as follows:

> Where a workman . . . has been examined by a medical practitioner selected by himself, and . . . the workman . . . has within 6 days after such examination furnished the other [the employer] with a copy of the report of that practitioner as to the workman's condition, then, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the registrar of a county court, on application being made to the court by both parties, may . . . refer the matter to a medical referee.

The Workmen's Compensation Act, 1923, s. 11 (1), provides that the power of the registrar of a county court under Sched. I, para. 15, of the 1906 Act to refer a matter to a medical referee may be exercised on the application of one of the parties as well as on the application of both parties, subject, however, to appeal to the judge, and, where the application is made by only one of the parties, the registrar, or, on appeal, the judge, if he is of opinion that, owing to the exceptional difficulty of the case, or for any other sufficient reason, the matter ought to be settled in default of agreement by arbitration, shall refuse to allow the reference.

Two points appear to be of importance. The first is that an application for the appointment of a medical referee can be made although no other proceedings under the Act are pending, and the second is that, where the application is by one party only, the registrar or the judge ought, in certain circumstances, to refuse to allow the reference—namely, where the tribunal is of opinion that the matter ought to be settled by arbitration in default of agreement between the parties. The latter point seems to recognise the position that arbitration proceedings cannot be instituted if an order for reference to a medical referee is made.

The jurisdiction of the county court in respect of matters arising under the Workmen's Compensation Acts is purely statutory, and is governed by the relevant Workmen's Compensation Acts and the rules thereunder. Where the county court judge is to be the arbitrator, his powers are derived, so far as the present case is concerned, from Sched. II, para. 2, of the 1906 Act, which provides that, in certain events, an arbitration under that Act shall be by the judge of the appropriate county court, "according to the procedure prescribed by rules of court." The appropriate rules in the present case are the Workmen's Compensation Rules, 1913-1924. The rules at present in force are not applicable: see the Workmen's Compensation Rules, 1926, r. 1 (2). Matters relating to applications for reference to a medical referee under Sched. I, para 15, of the 1906 Act are dealt with in the Workmen's Compensation Rules, 1913-1924, r. 57, which provides as follows:

> (1) With respect to applications to the registrar pursuant to para. 15 of Sched. I

> to the Act to refer any matter to a medical referee the following provisions shall have effect . . .

This subrule is followed by eight other subrules. It is only necessary to refer to part of subrule (3) and to subrule (9). Subrule (3) provides as follows :

> When the application is made by only one of the parties, the registrar or on appeal the judge if he is of opinion that owing to the exceptional difficulty of the case or for any other sufficient reason the matter ought to be settled in default of agreement by arbitration, shall refuse to allow the reference and may in that case make such order as to the costs of the application as he shall think fit.

Subrule (9) provides as follows :

> The costs of any application to the registrar . . . may be allowed as costs in any subsequent arbitration for the settlement of the weekly payment to be made to the workman or where the application is made after the weekly payment has been settled as costs in any subsequent arbitration as to the review of such weekly payment or may be allowed by special order of the judge on application in that behalf such application to be made on not less than 4 days' notice in writing and in accordance with the provisions of C.C.R., Ord. 12, r. 11, so far as applicable.

It will be noticed that the rule is silent with regard to the costs of an appeal from the registrar to the judge. C.C.R., Ord. 12, the order referred to in r. 57, relates to interlocutory and interim orders and proceedings. Rule 11 relates to practice on interlocutory applications in the county court. It provides as follows :

> Where by any statute or by these rules any application is expressly or by reasonable intendment directed to be made to the court or to the judge or to the judge or registrar or to the registrar then subject to the provisions of the particular statute or of the particular rule applicable thereto and so far as the same shall not be inconsistent therewith [certain provisions shall apply].

These provisions are contained in 6 numbered paragraphs. The material provisions are, I think, those numbered (4) and (5). Subrule (4) provides that the allowance of the costs of and incidental to the interlocutory application shall be in the discretion of the judge or registrar, and that no such costs shall be allowed on taxation without a special order. Subrule (5) provides that no taxation of costs of interlocutory applications, when allowed, shall take place until the general taxation of the costs without an express order.

In my judgment, C.C.R., Ord. 12, r. 11, is incorporated in r. 57 as an instruction to the judge as to how the costs of an application to the registrar under Sched. I, para. 15, are to be dealt with, and, when considered in conjunction with the direction at the beginning of the rule that the costs of application to the registrar are to be dealt with in any subsequent arbitration, they show with sufficient clarity that the costs of an application to the registrar where there is no subsequent arbitration are to be dealt with in the same manner as the costs of any interlocutory proceeding in the normal jurisdiction of the county court. If, as I think is the case, the costs of the application to the registrar are directed to be treated on the same basis as the costs of an interlocutory proceeding in a county court action, I can see no ground for holding that the costs of an appeal from an order made by the registrar on such an application can properly be dealt with except on the same basis, for an appeal from an interlocutory matter must itself be interlocutory.

The Workmen's Compensation Rules, 1913-1924, r. 76, provide for costs. Rule 76 (1) deals with costs of an incidental to an arbitration and proceedings connected therewith. Rule 76 (4) provides that, where proceedings are taken for which no provision is made by these rules or by the scales of costs, reasonable costs in respect of such proceedings may be allowed by the registrar, subject to review by the judge or by special order of the judge, not exceeding those which may under the scales be allowed in respect of proceedings of a like nature. The county court judge made an order with regard to the costs of the appeal to him from the registrar's order. Although I asked to be allowed to see this order, I was told that there was some doubt if it had ever been drawn up, but that, if it had been drawn up, it was not forthcoming. The parties proceeded on the footing that the judge's order was a simple dismissal of the appeal "with costs." It was contended by counsel for the appellants that these costs can only be taxed as if the appeal to the judge were an interlocutory application. For the reasons I have already stated, I think that this contention is correct. Both before the county court judge and in this court, reliance was placed by counsel for the respondents upon the decision of this court in *Re Reeves* (*Herbert*) *&* *Co.* (3). In my judgment, this decision has no application to the present case, for, as I have already stated, questions of costs and procedure in the county court under the Workmen's Compensation Acts are governed by those Acts, and I find in the present case that, by reason of the provisions of the Workmen's Compensation Rules, 1913-1924, r. 57, and the incorporation therein of C.C.R., Ord. 12, rr. 11, 76, there is a statutory provision with regard to the basis on which the costs of an application to the registrar for the appointment of a medical referee under Sched. I, para. 15, of the 1906 Act and sect. 11 (1) of the 1923 Act, and also of an appeal to the judge from that order, should be dealt with. I respectfully agree with my brethren that in no event can the question whether the costs in question should be taxed on the basis that the application was final or interlocutory depend upon the effect of the medical referee's certificate. For these reasons, I think that the appeal succeeds, and ought to be allowed.

GODDARD, L.J.: I agree that this appeal should be allowed, but I prefer to base my judgment on the broader ground dealt with by SLESSER, L.J., and not merely on a consideration of the rules, for, if an order is essentially one of an interlocutory nature, I am not satisfied that a rule of court can turn it into a final order. The only question which arises is whether the registrar's order referring a question to a medical referee under Sched. I, para. 15, of the Act of 1906 and sect. 11 of the Act of 1923, now replaced by sect. 19 of the Act of 1925, is final or interlocutory. The order in question is, and was, subject to an appeal to the judge, but the appeal and the order made thereon must have the same character as that of the original order. The test to be applied is whether or not the order finally determines the rights of the parties. To put it in other words, does it finally dispose of the issues between them? It seems to me clear that this order does not. It merely appoints a medical A referee to certify on certain matters, and inferentially orders the workman to present himself for examination by the referee. If the latter certifies one way, no doubt this will conclude the matter, but, if it certifies the other way, it will resolve one question only—namely, whether or not the workman is still suffering from the effects of an accident. It will B still be open to the employer to raise any defence he has—for example, that the accident did not arise out of the employment. In the former case, moreover, it is the certificate of the referee which is conclusive, and not the order. An order may, no doubt, be final although certain things remain to be done as a consequence. An order to wind up a company C or an order adjudicating a man bankrupt are instances, and so is an order in a redemption action. In these cases, the rights of the parties are determined, though results have to be worked out involving further inquiries. In the case under consideration, the object of the order is merely to obtain the opinion on a medical question of an independent D referee, thus avoiding a conflict of medical evidence. A further point was made that, inasmuch as in this case no proceedings had been started, the order could not be interlocutory, as that term is appropriate only to an order made in the course of some legal proceedings. The Workmen's Compensation Act, however, provides a code of procedure of its own. E This particular order can be made either when a workman makes a claim which the employer does not admit or when the employer seeks to discontinue payments which he has been making, whether under an award or merely by agreement. In any case, the question between the parties is whether or not the workman is entitled to compensation in the form F of a weekly payment. That the Act has provided a form of procedure which can operate before arbitration proceedings have begun is, in my opinion, immaterial, because the order does not determine whether or not the workman is entitled to that which he seeks. It directs something to be done for the purpose of enabling the issue to be determined, G which is exactly one of the functions of an interlocutory order. *Re Reeves (Herbert) & Co.* (3), on which the county court judge relied, is, in my opinion, in no way decisive of this case. In such a case as that, the question is whether or not the client is entitled to the delivery of a bill. The court answers Yes or No, and thereby decides the rights of the H parties, and decides that, if a bill has to be delivered, taxation may follow. That no more affects the question of whether the order is final than does the fact that taxation will follow where an action is ordered to be dismissed with costs, when taxation follows as a matter of course. In my opinion, the order appealed from is wrong, and the registrar should be ordered to tax the bill on the footing that it relates to an interlocutory matter.

Appeal allowed with costs in both courts, to include the costs of the application to the registrar for review of taxation.

Solicitors: *Barlow, Lyde & Gilbert*, agents for *Eking, Manning, Morris & Foster*, Nottingham (for the appellants); *Taylor, Jelf & Co.*, agents for *Hopkin & Son*, Mansfield (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

CAMERON *v.* PRENDERGAST.

[HOUSE OF LORDS (Viscount Caldecote, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Romer), **February 12, 13, March 12, 1940.]**

Income Tax—Remuneration—Company director—Payment for retaining office—Whether payment in discharge of contingent liability of company—Income or capital sum—Income Tax Act, 1918 (c. 40), *Sched. E, r.* 1.

Towards the end of 1934, C., who had for many years been a director of a company, notified his fellow-directors of his intention to resign, as he was entitled to do under the articles. The other directors thereupon wrote asking him not to serve notice of resignation, saying that, in consideration of his not doing so, the company would pay him a sum of £45,000, and would enter into a formal deed to that effect. Shortly afterwards, the company entered into a deed, which recited that the company, in the circumstances set out in the letter, and for the consideration therein specified, agreed to pay C. £45,000, in two amounts of £35,000 and £10,000 respectively. The remuneration of directors was at all material times fixed by resolution of the company in general meeting. C., who, previous to the execution of the deed, had received a salary of £1,500 per annum, agreed to remain a director at £400 per annum, on the understanding that he would devote less time in the future to the company's business. It was contended that the possibility of C.'s resigning was a contingent liability on the company, that this liability had in the meantime been discharged by a payment of £45,000, that the case was, therefore, analogous to *Dewhurst's* case (2), and that the sum of £45,000 was not liable to income tax:—

HELD: (i) this case was distinguishable from *Dewhurst's* case (2), in that the sum of £45,000 was paid to the appellant by the company in his capacity as a director of the company, and to induce him to continue to hold the office of director, and was not the compromise of a future and contingent liability to pay a lump sum on the cessation of his tenure of office.

(ii) the sum of £45,000, therefore, came within the charging words of Sched. E, r. 1, "all salaries, fees, wages, perquisites or profits whatsoever therefrom."

Order of Court of Appeal ([1939] 1 All E.R. 223) *affirmed.*

[**EDITORIAL NOTE.** The House of Lords have unanimously upheld the decision of the Court of Appeal, where, it will be remembered, SIR WILFRID GREENE, M.R., in a dissenting judgment, examined the consideration for the payment of the sum of £45,000, which was out of all proportion to the annual remuneration of the director. He found that the consideration was the act of the director in acceding to a request not to serve a notice of resignation. The House of Lords have, however, rejected this interpretation of the contract, which would have brought this case within the decision in *Dewhurst's* case (2), where the payment of such a sum was treated as the consideration for the release of the company from obligations which it would have to meet. In their Lordships' view, the facts of this case are wholly different from those in *Dewhurst's* case (2), in that the precise form, as well as the substance, of the documents on which this case depends, leads to the inevitable conclusion that the payment in question was a payment arising from the director's office.

AS TO VOLUNTARY PAYMENTS TO DIRECTORS AND SERVANTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 213, 214, para. 435; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Westminster (Duke)*, [1936] A.C. 1; Digest Supp.; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490.

(2) *Henry* v. *Foster (A.)*, *Henry* v. *Foster (J.)*, *Hunter* v. *Dewhurst* (1932), 16 Tax Cas. 605; Digest Supp.; *sub nom. Dewhurst* v. *Hunter*, 146 L.T. 510.

(3) *Gramophone & Typewriter, Ltd.* v. *Stanley*, [1908] 2 K.B. 89; 28 Digest 30, *153*; 77 L.J.K.B. 834; 99 L.T. 39; 5 Tax Cas. 358.

(4) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 28 Digest 56, *287*; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *revsg.*, [1914] 2 K.B. 891.

APPEAL from an order of the Court of Appeal (FINLAY and LUXMOORE, L.JJ., Sir WILFRID GREENE, M.R., dissenting), dated Jan. 23, 1939, and reported [1939] 1 All E.R. 223, affirming an order of LAWRENCE, J., dated Apr. 6, 1938, and reported [1938] 2 All E.R. 617. The facts and arguments are fully set out in the opinions of their Lordships.

Raymond W. Needham, K.C., and *R. A. Willes* for the appellant.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondent.

VISCOUNT CALDECOTE, L.C. [read by VISCOUNT MAUGHAM]: My Lords, the appellant was at the material time a director of a well-known building company, Higgs & Hill, Ltd. He had been employed by the company for 44 years, and had been a director of the company since 1919. The company was a prosperous one, and the appellant was largely responsible for its success. In 1934, he was minded to resign his position as director, because he desired a rest, and he informed his fellow-directors of his intention to give notice in writing to the secretary of the company, with the result that, by virtue of art. 107 (*d*) of the articles of association, his office would be vacated. Not unnaturally, the company was anxious to retain his services, and on Dec. 17, 1934, by the direction of the board, a letter was written to the appellant informing him that the board had considered his intimation that he intended forthwith to determine his directorship. The letter went on to ask him in the interests of the company not to serve the proposed notice, and stated that, in consideration of the appellant acceding to this request, the company would within 21 days, or by such instalments as he would accept, pay him a sum of £45,000. This undertaking would be embodied in a formal deed reciting the letter. The appellant accepted the offer. Accordingly, by a deed, dated Dec. 31, 1934, which recited that the appellant was then a director of the company, and that the company had, in the circumstances set out in the letter of Dec. 17, annexed to the deed, for the consideration specified in the letter, agreed to make Cameron two payments amounting in all to £45,000, the first A payment on Dec. 31, 1934, and the second on Mar. 31, 1935, the company bound themselves to make these payments. On the same day, a board meeting was held, at which the appellant was present, and it was resolved that the appellant should remain on the board of directors in an advisory capacity, and that his remuneration should be fixed at the B rate of £400 per annum as from the date of the meeting.

The question which arises in this appeal is whether the appellant is liable to income tax in respect of the sum of £45,000, as being a profit arising from the office of director, under the Income Tax Act, 1918, Sched. E. The special commissioners have held that the appellant C received the sum in question for the consideration expressed in the letter and embodied in the deed. They accepted the deed as genuine, and found that the conditions of the deed had been carried out. They therefore held that the sum of £45,000 was not subject to income tax under Sched. E in the hands of the appellant, and discharged the assess- D ment. LAWRENCE, J., reversed this decision, on the ground that the true consideration for the payment of the £45,000 must have been the desire of the company that the appellant should continue as a director, with the result that the payment arose from his office as director. The Court of Appeal by a majority approved the judgment of LAWRENCE, J., E and this appeal is from their decision.

Tax is charged under Sched. E in respect of every public office or employment of profit. Sched. E, r. 1, provides that tax shall be charged :

> . . . on every person having or exercising an office or employment of profit mentioned in this schedule . . . in respect of all salaries, fees, wages, perquisites or profits F whatsoever, therefrom for the year of assessment . . .

It is admitted that the appellant's directorship was an office of profit, and that he received the sums in question in the year of assessment while holding that office. The only question, therefore, is whether these payments arose from the office held by the appellant. We have G been invited by counsel for the appellant, in considering this question, to fix our gaze on the precise words of the letter of Dec. 17. Reference was made to the decision in *Inland Revenue Comrs.* v. *Westminster (Duke)* (1), in which observations were made by LORD TOMLIN and others of your Lordships as to the importance of giving effect to the proper H legal interpretation of documents, provided they are *bona fide* and not only used as a cloak to conceal a different transaction. It had been argued on behalf of the Inland Revenue Commissioners in that case that the substance of the arrangements contained in the material documents must be regarded, and not merely the form. Such a suggestion found no favour with the majority of the noble and learned Lords who heard that appeal, and I certainly have no intention of departing in any way from what was there laid down. How does it help the appellant? In this case, the substance and the form of the documents seem to me to be the same. The appellant was anxious to retire, and, but for the inducement offered to him not to do so, he would have signed a notice of resignation. The company valued his services, and they were prepared to pay a large sum to him to induce him to abstain from his intention to resign, and thus to continue as director.

Your Lordships are asked to say that, in these circumstances, the only consideration for the payment was the act of the appellant in acceding to the request of the company not to serve the notice of resignation. If it were not for the approval given by Sir Wilfrid Greene, M.R., to this submission, I should have thought that it only required to be stated to be rejected. I can see no difference between a promise not to resign and a promise to continue to serve as director. It is true that the appellant did not give any promise in words to continue to serve for any period of time, any more than the board by their resolution of Dec. 31 named a term of service. It is fair to assume that, in the course of the appellant's long connection with the company, his fellow-directors had learned that they could trust him. Whether or not it was open to him, having received the sum, to resign immediately afterwards is a question which I find it unnecessary to answer. The appellant's colleagues on the board no doubt knew the man with whom they had to deal, and were confident that, if he received the money which they were prepared to pay him, they would get good value for it.

My Lords, like the special commissioners, I accept the deed as genuine. The consideration stated in the deed for the payment of the money is that the appellant should not resign. If he resigned, his office as director would cease. If he did not resign, it would continue. To call the continuance of his office "a by-product of the undertaking not to deliver notice of resignation" seems to me, with all respect to Sir Wilfrid Greene, M.R., to be a misdescription of the contract. The continuance of the appellant in his office was the essence of the bargain. If anything was needed to make plain the intention of the parties as expressed in the letter and in the deed, the minute of the board dated Dec. 31 is conclusive. I agree with the statement by Luxmoore, L.J., that, so far as the company was concerned, the only legitimate ground for making the payment was to induce the appellant not to resign, and so to continue his services as a director. Sir Wilfrid Greene, M.R., was of opinion that, if, having received payment of the £45,000, the appellant had forthwith served a notice of resignation, the company's cause of action would have been for damages for breach of a contract not to serve the notice of resignation. I do not know what damages could be recovered for the breach of such an agreement, if it is to be regarded as a mere contract not to send a piece of paper containing notice of resignation. If, on the other hand, it is something more than that, it could only be what the form of words used in the letter seems to me to express —namely, an agreement to continue as a director of the company in consideration of the payment of £45,000.

Your Lordships were pressed with the decision in *Dewhurst's* case (2). I agree with all the members of the Court of Appeal, and with Lawrence, J., that that decision does not cover this case. The facts were, as Lord Warrington of Clyffe said, very special. Lord Atkin and Lord Thankerton, who decided that case with Lord Warrington of Clyffe in favour of the taxpayer, treated the payment in question as a sum paid for the release of the company from obligations which they would themselves have to meet. The facts of this case are wholly different, and are such as to make it impossible to come to a similar conclusion. The conclusion which I have reached is that the payment in question was a payment arising from the appellant's office. This, I think, is the inevitable result of giving effect to the precise form, as well as to the substance, of the documents on which the case depends. It follows that, in my opinion, the order of the Court of Appeal should be affirmed, and this appeal dismissed with costs.

Viscount Maugham: My Lords, as appears from the case stated by the Commissioners for the Special Purposes of the Income Tax Acts, the only question on this appeal is whether the appellant is liable to income tax in respect of a sum of £45,000 paid to him by a private limited company carrying on business as builders and contractors in which he was a director. The Crown contended that this was a profit arising from the office of director within the Income Tax Act, 1918, Sched. E. The commissioners discharged an assessment based on that view. On appeal, Lawrence, J., held that the commissioners' determination was erroneous. The Court of Appeal (Finlay and Luxmoore, L.JJ., Sir Wilfrid Greene, M.R., dissenting) affirmed the decision of Lawrence, J. The appellant appeals to this House.

The material facts cannot be better stated than they were by Lawrence, J. He said, at pp. 618, 619:

> The [appellant] had been for many years a director of a company of builders and contractors. Towards the end of 1934, he had intimated to his fellow-directors his intention of resigning, as he was entitled to do under art. 107 of the company's articles of association. The other directors then wrote to him a letter of Dec. 17, 1934, in which, after having considered his recent intimation that he intended forthwith to determine his directorship, they asked him, in the interests of the company, not to serve such notice, and said that, in consideration of his acceding to this request, the company would, within a certain time, pay him a sum of £45,000, and would embody their undertaking so to do in a formal deed. Then, on Dec. 31, 1934, the company entered into the deed which recited that the company, in the circumstances set out in the letter of Dec. 17, 1934, had, for the consideration therein specified, agreed to make the [appellant] the payments thereinafter set out—that is to say, £35,000 and £10,000.
>
> The commissioners have held that the [appellant] received the sum of £45,000 for the consideration expressed in the letter of Dec. 17, 1934, and embodied in the deed of Dec. 31, 1934. They state that they accept the deed as genuine, and find that the conditions contained therein had been carried out.

The deed of Dec. 31, 1934, between the company and the appellant, omitting parties and formal parts, was in these terms:

> Whereas Mr. Cameron is a director of the company and whereas the company in the circumstances set out in the letter hereunto annexed has for the consideration therein specified agreed to make to Mr. Cameron the payments hereinafter set out and it is hereby agreed between the parties that the company shall pay to Mr. Cameron the following sums on the following dates: on Dec. 31, 1934, the sum of £35,000 and on Mar. 31, 1935, the sum of £10,000.

The letter annexed was the letter of Dec. 17 referred to above.

On these facts and findings, the question is whether the sum of £45,000 was paid to the appellant in his capacity as a director, and to induce him to continue to hold his office of a director, so that the sum comes within the charging words of Sched. E, r. 1—namely, "all salaries, fees, wages, perquisites or profits whatsoever [from the office of a director]"—or whether the sum was paid merely to obtain his agreement not to serve the notice for, say, one day, leaving him perfectly free to retire on the next day, in which case the sum, as Sir Wilfrid Greene, M.R., held, would not be a profit arising from the office.

In his dissenting judgment, to which I have given the most anxious consideration, Sir Wilfrid Greene, M.R., seems to have thought that the case was in effect decided by the findings in the special case. He observed, at p. 227:

> The crucial finding of the commissioners is as follows: "We hold that the respondent received the sum of £45,000 for the consideration expressed in the said letter dated Dec. 17, 1934, and embodied in the said deed made Dec. 31, 1934. We accept the deed as genuine and find that the conditions contained therein have been carried out." This finding we are not entitled to question, nor are we entitled to say that in substance it means something different from what it says. . . . The contract did not impose upon the appellant any obligation to act as a director. It is true that, so long as he refrained from serving a notice, he remained as a director, but this was a by-product of his undertaking not to serve the notice, and not the performance of that undertaking.

With the greatest respect to Sir Wilfrid Greene, M.R., I cannot agree. If the finding of the commissioners is taken literally, I see no reason to quarrel with it. If, however, it is to be taken as meaning what Sir Wilfrid Greene, M.R., appears to extract from the finding, I am compelled to differ. Inferences from facts stated by the commissioners are matters of law, and can be questioned on appeal. The same remark is true as to the construction of documents. If commissioners state the evidence and hold upon that evidence that certain results follow, it is open to the court to differ from such a holding. I agree with the remarks of Sir H. H. Cozens-Hardy, M.R., in *Gramophone & Typewriter, Ltd.* v. *Stanley* (3), at p. 95, and also with those of Lord Atkinson in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (4), at p. 449.

On the facts found by the commissioners, I should come to the conclusion that the sum of £45,000 was paid to the appellant by his co-directors, acting for the company, to induce him to continue to serve the company as a director for at least a reasonable time. That was not, I think, a by-product of his undertaking not to serve the notice, but the real and plain meaning of the undertaking. An agreement by the appellant not to resign his office is precisely similar to an agreement to continue to act as a director. His co-directors must be presumed to be honest men, making payment of a large sum in the interest of the company and its shareholders. I hesitate to stigmatise the transaction involved in the payment if it is to be regarded as really meaning that the appellant could have given a notice to retire within a few minutes after he received the sum of £45,000, if not before. We must interpret the findings of the commissioners in the light of common sense and common knowledge. Apart from this view, I think that the inference which I have drawn from the findings is a matter of law, based to a large extent on the well-known law relating to directors of a limited company, and to their inability to make presents out of the funds of the company to a brother director, or to pay him substantial sums for a clearly nominal consideration. Further, it is important to notice that there was a contemporaneous agreement on the part of the appellant to remain as a director at a salary of £400 per annum. This circumstance seems to me to afford strong corroboration of the view of the transaction which Lawrence, J., and Finlay and Luxmoore, L.JJ., have taken. If a sum is paid by a company to a man who has long been, and still is, a director of the company, and whose services are greatly valued, and if the consideration is that he will not resign, but will continue to act as a director, I cannot myself doubt that in such a case the sum is a profit of his office, and is liable to tax, and none the less so because the time during which he will continue to be a director is not fixed. This is the view of the appellant's agreement with the company taken by Finlay and Luxmoore, L.JJ., in affirming the judgment of the trial judge, and I agree with their decision and the reasons they have given for it.

I ought to add that in my opinion *Dewhurst's* case (2) is distinguishable from the present case. It was a curious case, and occasioned a good deal of diversity of judicial opinion, but, in my view, it turned on the unusual circumstance that Commander Dewhurst had only to resign his office as director to become entitled immediately, under art. 109 of the company's articles, to a sum exceeding £10,000, whilst, if he did not resign, and remained a director at £250 per annum for any length of time (as suggested), he would forfeit far the greater part of the sum payable under art. 109. In these circumstances, it was held by a bare majority in this House that the sum of £10,000 was paid to Commander Dewhurst to obtain a release of his right to a greater sum under art. 109. On this view, it was not paid as " wages, perquisites or profits " derived from his office of director. I do not think this case throws any light on the nature of the payment of £45,000 to the appellant. For the above reasons, I am of opinion that this appeal should be dismissed with costs.

Lord Russell of Killowen [read by Lord Romer]: My Lords, in my opinion, the order of the Court of Appeal should be affirmed. The question is whether the sum of £45,000 which was paid to Cameron was a profit from his directorship. I feel no doubt, upon the facts of this case, that it was. It was paid to him in his capacity of a director, and as a consideration for his agreeing not to cease giving his services as a director to the company—an agreement, which, as Luxmoore, L.J., pointed out, necessarily involves an agreement to continue to render those services. Money paid as a consideration for such a bargain appears to me to be clearly a profit from his directorship.

It is said that he was at liberty to determine his directorship immediately he had received the £45,000, because he had merely agreed to refrain, at a particular time, from serving a notice to end his directorship. I do not agree. He would have been bound to serve for a reasonable time, the length of which would be judged on a consideration of all relevant circumstances, including the large amount of the sum paid. The other view imputes to the directors that they paid away this large sum for nothing, in other words that they made a present to their co-director, a thing which neither they nor the company would have any right to do.

It is further said that my view involves a departure from, or a contradiction of, the commissioners' findings. That is not the case. Their finding is merely that the deed means what it says, and is not a cloak for some different transaction. What the deed says, however, is a question of construction, and I have indicated what, in my opinion, it means and involves. The case is not covered or governed by the decision in *Dewhurst's* case (2). The grounds for that decision, so far as they are to be found in the opinions of Lord Atkin and Lord Thankerton, were that the transaction was the compromise of a money claim against the company by the acceptance of a smaller sum. It bears no resemblance to the present case. Finally, it was suggested that the moneys paid to Cameron were in the nature of capital payments. For this I can see no foundation except the size of the sum involved. That feature alone is no justification for the suggestion.

Lord Wright: My Lords, Sched. E, r. 1, is expressed in very wide terms. The tax is imposed " in respect of all salaries, fees, wages, perquisites or profits whatsoever " from the particular office of profit, which in this case is the appellant's directorship. The language thus includes casual or extraordinary profits, whatever their size. These wide terms would naturally seem to include the £45,000 in question, which was paid to the appellant as a director in the past and at the time, and for continuing to be a director, or, what is the same thing, for not resigning his directorship. In my opinion, this was the true nature of the payment, and, therefore, the substance of the transaction. The consideration was correctly and sufficiently expressed in the deed, and in the letter which it incorporated. It was there stated that it was in the interests of the company that the appellant should accede to the company's request not to serve a notice of resignation. It is clear that the directors thought it worth while in the interests of the company to pay £45,000 to the appellant to secure the continuance of his services as director. I cannot think that the payment was not a profit from his directorship, even though it was a payment on a generous scale, and not based on any particular estimate of the company's earnings. It was, in fact, an extraordinary payment to secure what the company presumably thought was an adequate advantage—namely, that the appellant should continue as director, and should not cease to serve as such. It is said that the consideration was nugatory, because it was limited to the mere obligation of the appellant not to resign at that moment, so that he would not have broken it by resigning next day. The company, however, were dealing with a man who had served their interests faithfully for over 40 years, and who was not likely to play them a scurvy trick merely because he was generously treated. As a matter of law, however, I do not agree that the appellant would not have been breaking his promise if he had resigned next day. His promise, I think, should be construed as a promise not to resign for a reasonable period. Similarly, under his contemporaneous agreement to serve in an advisory capacity at £400 per annum, which, in my opinion, was an integral part of the transaction, I think it was implied that he would so serve for a reasonable period. It seems to me that the company paid the £45,000 to the appellant as an extra remuneration to him for continuing as a director, and he received it on that same footing. In my judgment, it fell within the category of "profits whatsoever" of his directorship. This conclusion follows in law from the facts stated. It was somewhat faintly suggested that the sum was capital, and not income. I think that this contention is untenable. I fail to see what ground there is for that suggestion. The mere fact that the sum is large is not in itself a ground.

I have not found any help from *Dewhurst's* case (2), which, whatever it decides, is on different facts. It is difficult to elicit any principle from the majority decision of the House. Lord Warrington of Clyffe expressly decided it on its special facts. Lord Atkin and Lord Thankerton based their decision, as I understand it, on the ground that the money paid was not a profit from the directorship, but was the compromise of a future and contingent liability to pay a lump sum on the cessation of his office. Viscount Dunedin and Lord Macmillan, who agreed with the Court of Appeal, thought that the payment had the quality of deferred pay, and was referable to the terms of the original engagement, and was a profit of the directorship. In any event, the decision, as I have said, turned on different facts, and furnishes no principle which helps in the present case. In my opinion, the appeal should be dismissed.

Lord Romer: My Lords, the question to be determined in this case lies within a narrow compass. It can be stated quite shortly as follows. Was the sum of £45,000 paid to the appellant as the consideration for a promise on his part to continue the performance of his services as a director of the company ? If this question be answered in the affirmative, the appeal must fail, for the sum would in that case clearly be part of the "salaries, fees, wages, perquisites or profits" from the appellant's office of director within the meaning of the Income Tax Act, 1918, Sched. E, r. 1. It matters not that the sum is a lump sum, payable at once, instead of being spread over a number of years, and depending in no way upon the number of years already spent, or to be spent in the future, by the appellant in the office. Nor does it matter that the sum is so large as to present the appearance of a capital, rather than of an income, payment. If a company chooses to pay a director's remuneration in a lump sum, it can, no doubt, lawfully do so, but the sum nevertheless represents income, whatever its amount, and will be taxable as such. Remuneration which, if paid by instalments over a number of years, would be income, is income though paid once and for all in a lump sum, just as much as the capital consideration for a sale, say, of land is capital, even though payable by instalments spread over a number of years.

My Lords, turning now to the question which I have stated above, I confess that to my mind it admits of only one answer, whether one considers the deed of Dec. 31, 1934, and the letter of Dec. 17, 1934, annexed thereto, alone, or whether one considers, as forming part of the same transaction, the deed, the letter, and the minute of the resolution passed at the board meeting of Dec. 31, 1934, together. Taking the deed first, it will be seen that the consideration for the agreement by the company to pay the £45,000 is expressly stated to be that specified in the letter, and the consideration specified in the letter is the acceding by the appellant to the request of the company not to serve a notice exercising his right, under art. 107 of the company's articles, forthwith determining his directorship. This surely makes it as plain as language can do that, in consideration of the payment of £45,000, the appellant will not determine his directorship. In other words, for it means precisely the same thing, he will continue to act as a director. It was submitted on behalf of the appellant that this conclusion as to the consideration moving from him for the company's agreement to pay the £45,000 in effect reverses and disregards findings of fact by the Special Commissioners, by which every appellate tribunal was bound. The findings referred to were in the words following :

> We hold that the respondent received the sum of £45,000 for the consideration expressed in the said letter dated Dec. 17, 1934, and embodied in the said deed made Dec. 31, 1934. We accept the deed as genuine . . .

However, the conclusion I have arrived at as to the true nature of the consideration in no way impugns the genuineness of the deed, and is in truth founded upon the language of the deed and letter, and on nothing else. I merely differ from the commissioners as to the proper construction of that language, and, as pointed out by LUXMOORE, L.J., its proper construction is a question, not of fact, but of law.

In my judgment, therefore, the case of the appellant fails even if the deed and the letter are looked at without reference to the minute of Dec. 31, 1934. It is plain, however, that the resolution recorded in the minute must have formed part of the arrangement between the appellant and the company, and cannot in this connection be disregarded, for the deed and letter by themselves would lead to the conclusion that the duties and yearly remuneration of the appellant as a director were to be as theretofore. The minutes, however, show quite plainly that this was not so, and that the deed and letter do not record the whole of the terms of the arrangement then being made. When all three documents are read together, as they should be, the arrangement made becomes quite clear. In consideration of the payment of £45,000, the appellant agreed to continue to act as a director in an advisory capacity at the reduced remuneration of £400 per annum as from Dec. 31, 1934. For how long he was to continue so to act is not specified, but his fellow-directors were no doubt willing to trust to his honour not to resign his directorship unless by reason of ill-health or some such material change of existing conditions he should be compelled to do so. In any case, it would be an implied term of his agreement that he should continue to act for a reasonable time.

It only remains to say a word or two about *Dewhurst's* case (2), upon which the appellant placed great reliance. It is sufficient to say that the agreement which their Lordships had to consider in that case was in many respects different from the agreement in the present one. The case laid down no principle of construction, and can, therefore, have no conceivable bearing upon the question of construction with which your Lordships are now concerned. For these reasons, which are substantially the same as those given by FINLAY and LUXMOORE, L.JJ., in the Court of Appeal, I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Edell & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

IMPERIAL SMELTING CORPORATION, LTD. *v.* JOSEPH CONSTANTINE STEAMSHIP LINE, LTD.
THE KINGSWOOD.

[KING'S BENCH DIVISION (Atkinson, J.), **February 12, 13, 14, March 1, 1940.]**

Contract—Impossibility of performance—Frustration—Charterparty—Unexplained accident to ship—Onus of proof that accident not due to negligence—Bursting of auxiliary boiler—Accidents of navigation—Carriage of Goods by Sea Act, 1924 (*c.* 22), *Sched. art.* IV, *para.* 2 (*a*).

A ship was chartered to load a cargo, but on the day before she should have proceeded to her berth an explosion occurred in the auxiliary boiler, which made it impossible for her to undertake the voyage. The cause of the explosion could not be definitely ascertained, and, of three possible explanations, only one would have imported negligence on the part of the shipowners. The charterers claimed damages from the shipowners for failure to load a cargo. At the time of the accident, the ship was not an "arrived" ship, and, therefore, neither the express warranties nor the exceptions clauses in the charterparty had attached. The question thus arose whether, on a plea of frustration of the contract, the party setting up the plea had to prove that the frustration was not due to his negligence or whether the party denying the frustration must affirmatively prove negligence on the part of the party setting up the plea :—

HELD : (i) the burden of proving their claim was upon the claimants, and this burden they had failed to discharge, with the result that the claim had to be dismissed.

(ii) the bursting of a boiler was not an accident of navigation.

(iii) the Carriage of Goods by Sea Act, 1924, Sched. art. IV, para. 2 (*a*), only refers to damage to goods.

[**EDITORIAL NOTE.** Although the cases on frustration go back to the early part of last century, if not earlier, the full consideration of the doctrine is almost wholly confined to cases decided since the beginning of the Great War. The doctrine has been based on two alternative theories, (i) that the foundation of the contract has disappeared, or (ii) that a term to that effect would be implied in the contract. It is essential that the frustration should not be a self-induced frustration, and this would exclude a frustration brought about by the negligence of the party setting up the plea. Up to this point, no difficulty arises, but, where it comes to be asked whether the party setting up the plea must disprove his own negligence or whether the other party must prove the negligence of the party setting up the plea, there is an absence of direct authority, and that is the difficulty which arises in the present case. After a consideration of the various cases in which the burden of proof of negligence has arisen, the judge has based his final decision upon the fundamental principle that it is for the plaintiff to prove his case. Thus, if the defendant sets up frustration, and the facts proved are equally consistent with the frustration being due to the defendant's negligence and with it not being so due, the plaintiff must fail. The present case, where the cause of the accident leading to the frustration is not known, would seem to be more strongly in favour of the defendant.

AS TO FRUSTRATION, see HALSBURY, Hailsham Edn., Vol. 7, pp. 212-217, para. 296 ; and FOR CASES, see DIGEST, Vol. 12, pp. 379-383, Nos. 3131-3158.]

Cases referred to :

(1) *Bank Line, Ltd.* v. *Capel (Arthur) & Co.*, [1919] A.C. 435 ; 41 Digest 366, *2136* ; 88 L.J.K.B. 211 ; 120 L.T. 129.

(2) *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.*, [1935] A.C. 524 ; Digest Supp. ; 104 L.J.P.C. 88 ; 153 L.T. 425.

(3) *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A.C. 497; Digest Supp.; 95 L.J.P.C. 121; 134 L.T. 737.

(4) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 41 Digest 517, *3471*; 50 L.J.Ch. 411; 44 L.T. 381; *affg.* S.C. *sub nom. Nelson* v. *Dahl* (1879), 12 Ch.D. 568.

(5) *Blackburn Bobbin Co.* v. *Allen (T. W.) & Sons*, [1918] 2 K.B. 467; 12 Digest 398, *3226*; 87 L.J.K.B. 1085; 119 L.T. 215; *affg.*, [1918] 1 K.B. 540.

(6) *Horlock* v. *Beal*, [1916] 1 A.C. 486; 41 Digest 230, *685*; 85 L.J.K.B. 602; 114 L.T. 193; *revsg.*, [1915] 3 K.B. 627.

(7) *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, *3194*; 85 L.J.K.B. 1389; *sub nom. Re F. A. Tamplin S.S. Co., Ltd., and Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; *affg.*, [1916] 1 K.B. 485; [1915] 3 K.B. 668.

(8) *Court Line, Ltd.* v. *Dant & Russell Inc.*, [1939] 3 All E.R. 314; Digest Supp.; 161 L.T. 35.

(9) *Re Comptoir Commercial Anversois and Power, Son & Co.*, [1920] 1 K.B. 868; 12 Digest 396, *3218*; 89 L.J.K.B. 849; 122 L.T. 567.

(10) *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705; 41 Digest 418, *2616*; 84 L.J.K.B. 1281; 113 L.T. 195; *affg.*, [1914] 1 K.B. 419.

(11) *The Glendarroch*, [1894] P. 226; 41 Digest 414. *2580*; 63 L.J.P. 89; 70 L.T. 344.

(12) *Paterson Steamships, Ltd.* v. *Robin Hood Mills* (1937), 58 Lloyd, L.R. 33.

(13) *Standard Oil Co. of New York* v. *Clan Line Steamers, Ltd.*, [1924] A.C. 100; 41 Digest 428, *2691*; 93 L.J.P.C. 49; 130 L.T. 481.

(14) *The Northumbria*, [1906] P. 292; 41 Digest 417, *2606*; 75 L.J.P. 101; 95 L.T. 618.

(15) *Robinson* v. *Davison* (1871), L.R. 6 Exch. 269; 12 Digest 378, *3123*; 40 L.J. Ex. 172; 24 L.T. 755.

(16) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 12 Digest 618, *5102*; 32 L.J.Q.B. 164; 8 L.T. 356.

(17) *Rugg* v. *Minett* (1809), 11 East, 210; 39 Digest 405, *404*.

(18) *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651; 12 Digest 618, *5103*; 36 L.J.C.P. 331; 16 L.T. 669.

(19) *Howell* v. *Coupland* (1876), 1 Q.B.D. 258; 12 Digest 618, *5104*; 46 L.J.Q.B. 147; 33 L.T. 832.

(20) *Cutter* v. *Powell* (1795), 6 Term Rep. 320; 12 Digest 406, *3275*.

(21) *Jesse* v. *Roy* (1834), 1 Cr. M. & R. 316; 12 Digest 423, *3401*; 3 L.J.Ex. 268.

(22) *Morgan* v. *Sim, The London* (1857), 11 Moo. P.C.C. 307; 41 Digest 694, *5246*; *sub nom. The City of London, Morgan* v. *Sim*, 30 L.T.O.S. 236.

(23) *Abrath* v. *North Eastern Ry. Co.* (1883), 11 Q.B.D. 440; 22 Digest 46, *227*; 52 L.J.Q.B. 620; 49 L.T. 618; *on appeal* (1886), 11 App. Cas. 247.

(24) *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596; 36 Digest 91, *601*; 34 L.J.Ex. 220; 13 L.T. 148.

(25) *The Merchant Prince*, [1892] P. 179; 36 Digest 102, *681*; 67 L.T. 251.

(26) *Czech* v. *General Steam Navigation Co.* (1867), L.R. 3 C.P. 14; 41 Digest 425, *2667*; 37 L.J.C.P. 3; 17 L.T. 246.

(27) *Ballard* v. *North British Ry. Co.*, [1923] S.C. 43; 36 Digest 88, case *581 xix.*

(28) *MacFarlane* v. *Thompson* (1884), 12 R. (Ct. of Sess.) 232; 34 Digest 205, case *d.*

(29) *Fraser* v. *Fraser* (1882), 9 R. (Ct. of Sess.) 896.

(30) *Walker* v. *Olsen* (1882), 9 R. (Ct. of Sess.) 946.

(31) *Milne* v. *Townsend* (1892), 19 R. (Ct. of Sess.) 830; 36 Digest 88, case *581 xviii.*

(32) *Wakelin* v. *London & South Western Ry. Co.* (1886), 12 App. Cas. 41; 36

Digest 77, *507*; 56 L.J.Q.B. 229; 55 L.T. 709; *affg.* (1884), [1896] 1 Q.B. 189, n.

(33) *Hanson* v. *Lancashire & Yorkshire Ry. Co.* (1872), 20 W.R. 297; 8 Digest 93, *633.*

(34) *Powell* v. *M'Glynn & Bradlaw,* [1902] 2 I.R. 154; 34 Digest 128, case *981 xii.*

(35) *The Kite,* [1933] P. 154; Digest Supp.; 102 L.J.P. 101; 149 L.T. 498.

(36) *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.,* [1937] 1 K.B. 534; A [1936] 3 All E.R. 696; Digest Supp.; 106 L.J.K.B. 437; 156 L.T. 4.

(37) *Travers (Joseph) & Sons, Ltd.* v. *Cooper,* [1915] 1 K.B. 73; 3 Digest 74, *140*; 83 L.J.K.B. 1787; 111 L.T. 1088.

(38) *Morison, Pollexfen & Blair* v. *Walton* (1909), cited [1915] 1 K.B. at p. 90; 3 Digest 74, *143.*

(39) *The Stranna,* [1938] P. 69; [1938] 1 All E.R. 458; Digest Supp.; 107 B L.J.P. 33.

(40) *Daniel* v. *Metropolitan Ry. Co.* (1871), L.R. 5 H.L. 45; 36 Digest 32, *183*; 40 L.J.C.P. 121; 24 L.T. 815; *affg.* (1868), L.R. 3 C.P. 216, 591.

(41) *The Southgate,* [1893] P. 329; 41 Digest 431, *2709.*

(42) *Svenssons (C. Wilh.) Travaruaktiebolag* v. *Cliffe S.S. Co.,* [1932] 1 K.B. 490; Digest Supp.; 101 L.J.K.B. 521; 147 L.T. 12. C

(43) *Hamilton & Co.* v. *Mackie & Sons* (1889), 5 T.L.R. 677; 2 Digest 331, *138.*

SPECIAL CASE stated by an arbitrator to determine a question of the liability of the owners for failure to load a cargo. The facts are fully set out in the judgment.

Sir Robert Aske, K.C., and *Patrick Devlin* (for *A. A. Mocatta,* on war D service) for the appellants.

G. St.C. Pilcher, K.C., and *Charles Stevenson* for the respondents.

ATKINSON, J.: This is a special case stated in an interim award to determine a question of liability for a claim for damages by the charterers E against the owners of a ship for failure to load a cargo. The charterparty was dated Aug. 5, 1936, and was an agreement between the respondents, Joseph Constantine Steamship Line, Ltd., the owners of a vessel named the Kingswood, and certain agents for the claimants. It provided that the vessel should be ready at Port Pirie, South Australia, for the purposes F of the charterers, and should there load a full cargo of a certain description. The vessel was estimated to arrive at Port Pirie about the end of December, or early January. Clause 7, which was an exceptions clause, provided as follows:

> The act of God [various other exceptions are mentioned] and other accidents G of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the owners . . . and all the above exceptions are conditional on the vessel being seaworthy when she sails on her voyage; but any latent defects in the machinery, hull, or tackle shall not be considered unseaworthiness: provided the same did not result from want of due diligence of the owner or owners, or any of them, or of the ship's husband or manager. H

The other relevant clause is cl. 29, which provides as follows:

> This charterparty is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Carriage of Goods by Sea Act, 1924, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution hereof. This charterparty is subject to the terms and provisions of the Sea Carriage of Goods Act, 1924 (Australia), and the conditions

thereby implied in the bill of lading shall be deemed to form part of and be incorporated in this charter.

The ship left the Tyne for Durban in Oct., 1936. She then proceeded with cargo to Lorenco Marques, and in the first week of December sailed from there in ballast for Port Pirie in order to load the cargo provided for by the charterparty. She anchored in the roads of Port Pirie on Dec. 26, and on the following day the master tendered what purported to be a notice of readiness. This was not accepted as a proper notice, and it was agreed that the steamer should remain at anchorage until Jan. 4, and should then proceed to her berth. It was agreed in the case before me that the steamer never became "an arrived ship." The case finds as follows:

> . . . at approximately 8.55 a.m. on Sunday, Jan. 3, 1937, while the steamer was still anchored in the roads there occurred an explosion of extreme violence from the auxiliary boiler. As to the general features of the explosion there is no dispute. It was internal in the sense that it took place within the circumference of the boiler and it was due to the fact that there was a sudden opening of communication between the water and steam space and one or both of the combustion chambers. There is no doubt that the plain tubes and the majority of the stay tubes became at some stage displaced from their positions in both the front and back tube plates. Further there is common ground as to what immediately supervened. The energy released was such that the main boilers, situated aft of the auxiliary boiler, were set aft by the concussion of the explosion 4 ft. and 5 ft. 6 ins. respectively at which points their movement was arrested, whereas the auxiliary boiler itself was projected forward through two watertight bulkheads finally piercing the collision bulkhead at the forward end of No. 1 hold and breaking the shell plates at the starboard bow. The distance travelled by the auxiliary boiler before it came to rest in the forepeak was approximately 164 ft.

I am told that when it did come to rest the boiler itself—that is, the outside shell—was still intact. The respondents gave notice that they could not perform the charterparty, and it was agreed between the claimants and the respondents that the delay caused by the damage to the steamer was such as to frustrate the commercial object of the adventure. As the steamer could not be repaired in Australia, it was brought back to this country, and there was the usual examination by surveyors for both parties. There was also a Board of Trade inquiry under the Boiler Explosions Acts, 1882 and 1890, and there has been a long inquiry before the arbitrator in this case. The result of that inquiry before the arbitrator is expressed in para. 7 of the case as follows:

> Neither those who were responsible for conducting the Board of Trade inquiry nor any of the witnesses who gave evidence before me claimed to be able to state with any certainty the causes of the disaster or the sequence of events that led up to it. The explosion was one of an unprecedented character, and no sequence of events which was other than improbable was suggested as capable of having given rise to it.

The question of law involved in this case arises in this way. The claimants claim damages for failure to load. The respondents plead the destruction of the ship as a navigable unit, and claim that the contract was thereby frustrated without liability on their part. They also rely on the exceptions clause and the articles of the schedule to the Australian Sea-Carriage of Goods Act, 1924. The claimants in reply say that the frustration arose from the default of the respondents, who are not entitled, therefore, to rely upon it.

The general rule is that impossibility of performance is no answer to a claim for breach of contract. There are, however, certain exceptions to the rule. Among them certainly are personal contracts, where the possibility of performance necessarily depends upon the contractor being alive and in sufficiently good health to perform his contract, and performance becomes impossible through death or illness; and also contracts where the possibility of performance necessarily depends upon the continued existence of a specific subject-matter, and performance becomes impossible owing to the destruction of that subject-matter. In such cases, the contract, or the adventure contemplated by the contract, is said to be frustrated, and the contract is at an end, and no action lies for damages for breach. However, to quote LORD SUMNER in *Bank Line, Ltd.* v. *Capel* (*Arthur*) *& Co.* (1), at p. 452:

> I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated.

In *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (2), a case dealing with the position which arose when a trawler had been requisitioned by the government, in which the facts are not very material for my purpose, LORD WRIGHT said, at p. 530:

> The essence of "frustration" is that it should not be due to the act or election of the party. There does not appear to be any authority which has been decided directly on this point. There is, however, a reference to the question in the speech of LORD SUMNER in *Bank Line, Ltd.* v. *Capel* (*Arthur*) *& Co.* (1) . . .

Then he reads the passage which I have just read, and continues, at p. 530:

> A reference to the record in the House of Lords confirms LORD SUMNER'S view that the court below had not considered the point, nor had they evidence or material for its consideration. Indeed, in the wartime the Admiralty, when minded to requisition a vessel, were not likely to give effect to the preference of an owner, but rather to the suitability of the vessel for their needs or her immediate readiness and availability. However, the point does directly arise in the facts now before the Board

The point arose there because the Admiralty, I think, wanted three trawlers, and the defendants had selected the three which should be handed over, one of the three being the one which was the subject of the contract upon which that particular action was brought. Then LORD WRIGHT continues as follows, at pp. 530, 531:

> and their Lordships are of opinion that the loss of the St. Cuthbert's licence can correctly be described, *quoad* the appellants, as "a self-induced frustration." LORD SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (3) quotes from LORD BLACKBURN in *Dahl* v. *Nelson, Donkin & Co.* (4) who refers to a "frustration" as being a matter "caused by something for which neither party was responsible": and again he quotes the words of BRETT, J., which postulate as one of the conditions of frustration that it should be "without any default of either party." It would be easy, but is not necessary, to multiply quotations to the same effect. If either of these tests is applied to this case, it cannot in their Lordships' judgment be predicated that what is here claimed to be a frustration, that is, by reason of the withholding of the licence, was a matter for which the appellants were not responsible or which happened without any default on their part. In truth, it happened in consequence of their election. If it be assumed that the performance of the contract

> was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure: the appellants cannot rely on their own default to excuse them from liability under the contract.

In passing, it will be noticed that LORD SUMNER said that reliance cannot be placed on a frustration which is self-induced. He does not say "on A a frustration which is not proved to be not self-induced." The passage which I have read from the judgment delivered by LORD WRIGHT seems to me to imply the same idea. There, of course, the facts showed conclusively that there had been a self-induced frustration, and he was dealing with it on that assumption.

B It was agreed before me that the main question of law raised by the case is this. Is it for the person who has failed to perform his contractual obligation, and is setting up a case of frustration, to prove affirmatively, not only that performance became impossible owing to circumstances bringing him within the second of the exceptions I have C indicated, but also that the impossibility was not due to any negligence on his part, or is it for the party claiming damages to prove that the impossibility was due to the negligence of the defaulting party? That is the main point of law raised, and both sides agree that there is no direct authority on it. I put the question in this way. Supposing a D ship the subject-matter of a charterparty such as this is lost with all hands on the outward voyage, nothing being known of the circumstances —that is, nothing from which any inference can be drawn—does the shipowner lose because he cannot disprove negligence, or does the charterer lose because he is unable to prove negligence? I might go a E step further. Supposing a ship is lost with all hands by striking a mine, and that much is known, has the shipowner, in order to succeed in establishing frustration, to prove that a proper watch was being kept, and that the ship was being navigated with proper skill, or has the charterer to prove that there was some negligence in the navigation or look-out which F might have been responsible for the loss? It has not been argued that, if the burden rests on the claimant, it has been discharged. Perhaps it is not yet finally settled whether the true basis upon which the doctrine of frustration of contract rests is the term to be implied into the contract or whether it arises by operation of law as soon as it appears that the G basis of the contract has gone.

In *Blackburn Bobbin Co.* v. *Allen* (*T. W.*) *& Sons* (5), McCARDIE, J., in putting the principle, said, at p. 545:

> It was put with clearness by LORD SHAW in *Horlock* v. *Beal* (6), where he said [p. 512]: "The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties." It was H stated with equal clearness by VISCOUNT HALDANE in the *Tamplin* case (7), where he said [pp. 406, 407]: "The occurrence itself may . . . be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." In every case it is now necessary "to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue

> to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract": *per* EARL LOREBURN in the *Tamplin* case (7) [p. 403].

One has there three quotations, the first two, from LORD SHAW OF DUNFERMLINE and VISCOUNT HALDANE, putting it on the basis that the foundation of the contract had disappeared, and the third, from EARL LOREBURN, suggesting that a term to the same effect would be implied into the contract.

In *Court Line, Ltd.* v. *Dant & Russell Inc.* (8), BRANSON, J., has pointed out that the Court of Appeal in *Re Comptior Commercial Anversois and Power, Son & Co.* (9) had decided in favour of the former view, and said that, so far as a judge of first instance was concerned, the matter was concluded. If I accept what he says as right, that means that some term has to be implied into the contract. In what terms, though, is the implied term to be deemed to be expressed? Are they to be words simply indicating that the destruction of some specific subject-matter should put an end to the contract, or that the continued existence of such specific subject-matter should be deemed to be of the basis of the contract? Does negligence become relevant merely on the same principle that a man cannot rely upon an exceptions clause if his negligence has caused the excepted event, or must the implied term be deemed to contain words putting upon the parties seeking to be relieved the burden of disproving the negligence—that is to say, of proving frustration without default—and how far has that proof to go? I must seek what guidance I can from analogous cases. I think that I can find some from the way in which the question of proof of negligence has been dealt with in other cases of a character not very dissimilar to that of the case with which I have to deal here.

On the one hand I have cases under the Merchant Shipping Act, 1894, s. 502, which provides as follows:

> The owner of a British sea-going ship . . . shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity [in certain specific circumstances].

It has been held that the onus of disproving actual fault or privity is on the shipowner. The first case in which that was held was *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* (10) HAMILTON, L.J., at p. 436, dealt with the point, showing that at any rate in his mind it was one which was not free from doubt:

> Can it be said that the cargo was burnt without the actual fault or privity of the owners? Though I think that the whole onus lies on the shipowner of proving as a defence loss by a fire, of which he can predicate that it happened without his actual fault, and that "without his actual fault or privity" in the Merchant Shipping Act, 1894, s. 502, differs in this respect from negligence in connection with excepted perils in a bill of lading (*The Glendarroch* (11)), I need not decide it, for the facts proved are quite sufficient for the purpose, let the onus lie where it may.

In the House of Lords, it was decided quite clearly that under that section the onus lay, and lay entirely, on the owners setting up the section. That decision has been followed—as, of course, it would have to be—in

Paterson Steamships, Limited v. *Robin Hood Mills* (12) and *Standard Oil Co. of New York* v. *Clan Line Steamers, Ltd.* (13), at p. 113. The ratio of those decisions seems to be that the section creates a statutory exceptions clause, and that it is for the person setting up the clause to bring himself within it. On the other hand, there are many cases on exceptions clauses in charterparties, and it is beyond dispute that, when a loss apparently falls within an exception, the burden of showing that the owner is not entitled to the benefit of the exception on the ground of negligence is on the person so contending : *The Glendarroch* (11). That has been followed again and again. It is difficult to see why the implied frustration term should be treated in the same way as a statutory exceptions clause rather than in the same way as an express exceptions clause. Again, if a *prima facie* case of perils of the sea is made out, and the plaintiff alleges unseaworthiness, the proof is upon the plaintiff alleging it : *The Northumbria* (14), at p. 298.

Consider, too, the cases of incapacity through illness. There the principle is the same, as is seen, for instance, in *Robinson* v. *Davison* (15). Illness may well be due to neglect, but it has never been suggested in cases dependent on sickness that the sick person must prove absence of negligence, for the reason that illness raises no presumption of negligence. At any rate, I have looked at all the cases I can find on this, and I can find no suggestion anywhere that a person setting up illness as frustrating the possible performance of the contract has been called upon to prove an absence of fault on his part.

Then there are the cases arising under the Sale of Goods Act, 1893, s. 7. The language is very much the same, I suppose, as that in which the principle of frustration might be expressed even in an extreme form. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided. In *Taylor* v. *Caldwell* (16), BLACKBURN, J., referred, not, of course, to the section, but to the law which is embodied in the section, as based on the same implication. It has not been suggested, so far as I can find in any case on that section, that the general rules relating to negligence do not apply. In *Taylor* v. *Caldwell* (16), BLACKBURN, J., referred, for example, to *Rugg* v. *Minett* (17). In that case, there is no suggestion whatever that the vendor had to prove that he was not responsible for the fire which had destroyed the goods which had been sold and the property in which had passed. There have been many fire cases. *Taylor* v. *Caldwell* (16) was one. *Appleby* v. *Myers* (18) was another. I can find no suggestion in any of those cases that the person relying upon fire as an excuse for his breach of contract has been called upon to prove that the fire was in no way due to any negligence on his part. I suppose that fire does not raise a presumption of negligence, but, be that as it may, I have sought vainly for any suggestion that, where fire has produced impossibility of performance, the person setting it up has to prove exactly how it happened, and has to prove that it happened through no conceivable fault of his own.

Again, there are the bailee cases. I shall refer to those cases later on in my judgment. I need merely say at the moment that they do not impose upon a bailee anything like the burden which it is sought to impose upon the person setting up frustration in this case. I want to refer to *Taylor* v. *Caldwell* (16) for this purpose. I am looking at the report in Smith's Leading Cases, Vol. 2, p. 609. The judge was dealing with the condition which ought to be implied, or with what was the basis of the contract, and he said, at p. 609 :

> These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day ; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price and the vendor is excused.

He says that that rule of law was established by *Rugg* v. *Minett* (17). His judgment ended in this way, at p. 611 :

> The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance ; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the music hall at the time when the concerts were to be given ; that being essential to their performance.

It will be noted from that that there is not a word said about negligence or proof of negligence or disproof of negligence being deemed to be incorporated, yet it is quite clear from the judge's earlier statement of the principle that impossibility of performance caused by the destruction of the thing has to be without the default of the contractor. The inference I draw from that is that the implication is that the destruction of the subject-matter terminates the contract, but that one cannot rely upon it if it is established that one's own default has brought about that destruction. The judge continues as follows, at p. 611 :

> We think, therefore, that the music hall having ceased to exist, without fault of either party, both parties are excused . . .

It may be a trifling and small indication, but I think it is an indication, that Blackburn, J., there seems to be treating negligence in this way, not that the implied term has any reference to it, but that the implied term cannot be relied upon any more than an exceptions clause if the trouble has been brought about by the default of the owner. *Howell* v. *Coupland* (19) was a potato case. It will be remembered that there was a sale of 200 tons of Regent potatoes grown on land belonging to the defendant at so much a ton, to be delivered by September or October. In Mar., the defendant had 68 acres ready for potatoes, which were sown

and were amply sufficient to grow more than 200 tons in an average year. In Aug., potato blight appeared, and the crop failed, so that the defendant was able to deliver only 80 tons. The plaintiff brought an action for the non-delivery of the other 120 tons, but he failed. The only reason why I refer to this case is that the principle of *Taylor* v.
A *Caldwell* (16) was applied, and nowhere was there any suggestion that there was any burden upon the defendant to prove that his potatoes suffered from blight without default of his own. In *Appleby* v. *Myers* (18), one gets a little more guidance. There A had contracted to do work and supply materials upon the premises of B for a specific
B sum to be paid on the completion of the whole. A had done part of the work, when the building was destroyed by fire. He claimed payment for what he had done, and it was held that he had no claim, because he was not entitled to payment until he had completed his contract, and the impossibility of completing it had come about through the fire, and,
C therefore, he could not recover. BLACKBURN, J., said, at pp. 658, 659:

> We agree with the court below in thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have
> D had the option to sue the defendant for this default, or to treat the contract as rescinded, and sue on a *quantum meruit*. But we do not agree with them in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties . . .

It will be noted that he said:

> E . . . we agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work . . .

That seems to imply some established default, as is clear at the end of the judgment, where BLACKBURN, J., says, at p. 660:

> F . . . we think that, on the principles of English law laid down in *Cutter* v. *Powell* (20), *Jesse* v. *Roy* (21) [and so on] the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shewn that it was the defendant's fault that the work was incomplete; or that there is something to justify the conclusion that the parties have entered into a fresh contract.

In all the cases which I have looked at, that is the only sentence I can
G find which clearly indicates on whom was the burden—" or it can be shewn that it was the defendant's fault that the work was incomplete." It was BLACKBURN, J., who laid down the principle in *Taylor* v. *Caldwell* (16). When applying that principle in *Appleby* v. *Myers* (18), he used an expression which seems to me to indicate that it was his view that, in
H the case of a plaintiff claiming damages as on a breach, it was for him to prove that it was the defendant's fault that the work was incomplete. I can see myself no reason why the implied term should be so framed as to exclude the general rules governing the incidence of proof in the law of negligence, or why those rules should not apply to the problems raised in this case. Those rules have in the main been built up in actions for

tort, but they apply equally where the question of breach of contract depends upon whether or not there has been negligence. As a general rule, a party seeking to recover compensation for damage must prove that the party against whom he complains was in the wrong. To quote LORD WENSLEYDALE, in *Morgan* v. *Sim, The London* (22), at p. 312, he must show: A

> . . . that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed.

Some helpful rules relating to the onus of proof were laid down by BOWEN, L.J., in *Abrath* v. *North Eastern Ry. Co.* (23), at p. 456: B

> Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a *prima facie* case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the C tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting upon the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of D going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises, it ceases to be a question of onus of proof.

In such a case as this, the plaintiffs begin by proving that the ship did not arrive within the contract time, or at all. If the case stopped there, the plaintiffs would win. However, the respondents then prove an E accident which destroyed the ship as a navigable unit. The respondents prove an event which was the immediate, direct and dominant cause of that destruction. If the case stops there, what is the position? Who wins? I do not think that the answer is a simple one, but, in my view, the onus of ultimately satisfying the tribunal that the ship was at fault F rests on the claimants. Whether or not they have discharged that onus must be judged by applying the following principles—namely, (i) if it appears that the accident proved was of such a nature as to raise a presumption of negligence—that is, to afford some evidence of negligence —the onus is on the owner to destroy that presumption created by the G nature of the accident, (ii) if it appears that the accident proved was of such a nature as to afford no evidence of negligence, the onus is on the charterers to prove negligence in fact, and (iii) if the onus is upon the owner under the first principle, that onus is discharged by proving facts from which the inference that the accident was not caused by negligence H is as strong—that is, equally consistent with the facts—as is the inference that it was caused by negligence.

The first principle, of course, rests upon the law laid down by ERLE, C.J., in *Scott* v. *London Dock Co.* (24), at p. 601:

> There must be reasonable evidence of negligence. But where the thing is shewn

> to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

The proper inference to be drawn may be strong or it may be weak.

The Merchant Prince (25) is an example of a case where the inference was very strong, because a ship navigating the entrance to the Mersey ran into a ship which was at anchor. I need not read the case, but the substance of it was that, in a case of that kind, where there was such apparent negligence, which it was very difficult to explain, the presumption had to be rebutted, and the defendant there was called upon to prove that the accident was brought about by some cause for which he was not responsible, which he failed to do. However, how far this presumption ought to be drawn, and the strength of the presumption to be drawn, are perhaps well illustrated by WILLES, J., in *Czech* v. *General Steam Navigation Co.* (26), at p. 19:

> I will, however, assume that it is so for the purpose of this case, but it does not, therefore, restrict the plaintiffs as to the nature of the evidence by which such negligence shall be proved. To explain this by an illustration. If a shipment of sugar took place under a bill of lading, such as the present one, and it was proved that the sugar was sound when put on board, and had become converted into syrup before the end of the voyage, if that was put as an abstract case I think the shipowner would not be liable, because there may have been storms which occasioned the injury, without any want of care on the part of the captain or crew; the injury alone, therefore, would be no evidence of negligence on their part. But if it was proved that the sugar was damaged by fresh water, then there would be a strong probability that the hatches had been negligently left open, and the rain had so come in and done the injury, and, though it would be possible that some one had wilfully poured fresh water down into the hold, this would be so improbable that a jury would be justified in finding that the injury had been occasioned by negligence in the management of the ship.

In other words, whether or not a presumption of negligence should be drawn must always depend on the circumstances.

In *Ballard* v. *North British Ry. Co.* (27), there is to my mind a most illuminating opinion of LORD DUNEDIN on this point. He differed in his conclusion on the facts from the other members of the House, but what he said has been referred to again and again with approval. It was an action for damages, where negligence was alleged in the handling of railway trucks in a goods yard. However, the facts do not really matter for this purpose. LORD DUNEDIN says, at pp. 53, 54:

> The foundation of all actions of the kind we are considering must be negligence on the part of the defender, and whether the expression *res ipsa loquitur* is applicable or not depends upon whether, in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence. Thus, there is a class of cases dealing with injury occurring to a servant owing to defective plant. . . . Yet it is significant to notice that these cases may be unduly applied, and LORD JUSTICE-CLERK MONCREIFF found it necessary to correct the tendency in *MacFarlane* v. *Thompson* (28). The accident there was due to a casing falling from the boiler on which the pursuer was working and injuring him. His Lordship had been a party to the judgments in *Fraser* v. *Fraser* (29) and *Walker* v. *Olsen* (30). LORD CRAIGHILL had said, at p. 235: "It would, I think, be very unfair to the master to hold that where the cause of the accident was unascertained, or, it may be, unascertainable, it is to be held that that cause must necessarily have lain in some defect of the machinery, and that the master must therefore be found liable," and LORD JUSTICE-CLERK MONCREIFF said, at p. 235: "I only add to what LORD

> **CRAIGHILL** has said a single sentence for the purpose of explaining my meaning in the opinions I delivered in the cases referred to. It has been sought to interpret these opinions as authority to the effect that you must presume from the fact that an accident has occurred that there was some defect in the machinery. I do not think that any such interpretation can be put upon what I said there. What I did say was that, provided that it is proved that some defect in the machinery or plant caused the accident, it is not necessary to show the precise nature of that defect, and an onus is thrown upon the master to show that the defect was one for A which he was not to blame, but that is a totally different thing from saying you must infer faults or defects in the machinery where there is no evidence to that effect in any of the surrounding circumstances." . . . Taking the cases in which the mere fact of the accident is relevant to infer negligence, it is sometimes said, and the LORD ORDINARY has said it, that there is then raised a presumption of negligence which the defender has got to rebut. I think that this is too absolute a method of expressing the legal result in all cases. It was this same feeling that, I think, led LORD ADAM to say in *Milne* v. *Townsend* (31) [p. 836]: "The *res* can only B speak so as to throw the inference of fault upon the defender in some cases where the exact cause of the accident is unexplained." If indeed "relevant to infer" and "necessarily infers" were the same thing, then I think it would be right to say that, when an accident arises in cases where the doctrine is applicable, then a presumption of fault would arise which must be overcome by contrary evidence, and that is the way that the LORD ORDINARY has looked at the matter. But "relevant to infer" and "necessarily infers" are not synonymous, and the difference C becomes of moment in a case like the present. I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step ? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion. For example, in *Scott* v. *London Dock Co.* (24), a case where a bag of flour fell on a man D who was passing along a quay in front of a warehouse, it would not have been sufficient to say that the flour bag might have fallen from a passing balloon. I think this view of mine is borne out by the expressions used in [*Scott's* case (24)].

Then he quotes the principle which I have already read. The importance of *Ballard's* case (27) is that it indicates when that presumption, if it is fair to raise it from the nature of the accident, is rebutted. In E the view of LORD DUNEDIN, it was rebutted if the defence could show a way in which the accident might have occurred without negligence.

Here, this ship and the boiler being under the respondents' management, and the explosion of a boiler being somewhat unusual (perhaps very unusual nowadays), it may be, and I must assume, that these facts F afford some evidence of want of care. Whether or not every boiler explosion is an accident of such a nature as fairly to raise such an inference I do not know. However, it is not necessary to come to any decision as to that, because in this case there has been a Board of Trade inquiry, a prolonged examination of the circumstances before an arbitrator, and G certain findings, the result of which has been set forth in the case stated. With whatever inferences and presumptions an inquiry may start, and however often the onus may shift as matters of evidence, the ultimate question must be whether or not it has been established that the respondents were to blame for the accident ? That is in substance taken from H *Wakelin* v. *London & South Western Ry. Co.* (32). It was the case of a woman suing for the death of her husband, caused by the alleged negligence of the railway company. LORD HALSBURY, L.C., says, at p. 44 :

> . . . it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent

> act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails . . . If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—
A her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails . . .

Then LORD WATSON pointed out, at p. 47, that it is not enough merely to prove acts of negligence. The defendants may be guilty

> B . . . of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury.

If, in the result, the scales are even, and the tribunal is unable to say
C that the facts are more consistent with negligence than they are with the absence of negligence, the plaintiff fails.

In *Hanson* v. *Lancashire & Yorkshire Ry. Co.* (33), BRETT, J., says, at p. 297:

> ". . . it seems now to be clearly established that in order to render the company
> D liable for negligence it is necessary to give affirmative proof of negligence on their part; and it is not sufficient merely to prove the occurrence of an accident, and to rely upon that as *prima facie* evidence of negligence. In some cases, *res ipsa loquitur*, the accident may be of such a nature as that negligence may be presumed from the mere occurrence of it. But when the balance is even, the onus is on the party which relies upon the negligence of the other to turn the scale."

In *Powell* v. *M'Glynn & Bradlaw* (34), FITZGIBBON, L.J., said, at p. 190:

> E Where there are two hypotheses, one involving and the other not involving the liability of a defendant, each equally consistent with the evidence, the plaintiff cannot get a verdict.

That principle has been applied in three recent cases. The first is *The Kite* (35), which was an Admiralty case, tried by LANGTON, J. There
F had been a collision between a barge which was being towed and, I think, the buttress of an arch. The passage to which I want to refer is as follows, at p. 168:

> Have the plaintiffs proved that the defendants were negligent? The plaintiffs say: "You were towing the barge; the barge struck the bridge." That I think is sufficient to shift the burden of proof for the moment, and it is for the defendants
> G to give an explanation of how this occurred. When they have given that explanation one has still to see whether negligence has been proved. The explanation may be disbelieved; the explanation may not at all exclude negligence, but the explanation may leave the matter still in some doubt as to exactly how the occurrence did happen, but leave an equal possibility that it happened without negligence as with negligence. It may, on the other hand, be sufficient to exclude any question of negligence at all. Those are all possibilities of what may result from the explanation. Before I pass from that I will cite one more case which I think is of great
> H assistance in this question . . .

Then he referred to *Ballard* v. *North British Ry. Co.* (27), and read that passage which I have read from the opinion of LORD DUNEDIN, at p. 54:

> . . . if the defenders can show a way in which the accident may have occurred without negligence . . .

and applied it to the case before him.

The next case to which I want to refer (and this is a bailee case) is *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (36). That was a case of goods which had been deposited in a warehouse, and had been stolen. The law, I think, is clear as to the position of a bailee in those circumstances. If he cannot produce the goods, he has to disprove negligence. He has to explain non-production in some way. The point of the case, for my purpose, is that it shows how far a bailee has to go in the disproof of negligence, and it may be difficult to suggest that a shipowner is in a worse position than that of a bailee. What is it that the bailee has to show ? The judgment in this case was given by LORD WRIGHT, M.R., ROMER, L.J., and MACNAGHTEN, J., and the two last-named both agreed with the judgment of LORD WRIGHT, M.R. The case had been tried by BRANSON, J., who accepted the evidence of the defendants that they had a careful system under which goods were normally safe. It was argued, however, that there had been no explanation as to how and when the goods had been stolen. All that the bailees had done was to say that they had a reasonably good system, and that was not sufficient. It was argued that they had not discharged the onus on them because they had not explained how the goods had gone, or how the thieves had got in, or for what purpose. LORD WRIGHT, M.R., said, at p. 539 ([1936] 3 All E.R., at p. 702) :

> In the present case, the stealing of the goods being admitted, the plaintiffs have given evidence that they have taken all reasonable precautions to protect the goods against the risk of theft and they [the warehousemen] say they have satisfied the burden of proof which rests upon them, and that they are outside the rulings I have just quoted. They further rely upon a statement of the rule given (in a dissenting judgment, it is true) by LORD DUNEDIN in *Ballard* v. *North British Ry. Co.* (27) . . .

The plaintiffs were suing for money due to them, and the defendants were counterclaiming for the value of the goods. Then he read the passage which I have read, and continued as follows, at p. 539 ([1936] 3 All E.R., at p. 702) :

> I think this is merely stating the same rule as that stated by LORD LOREBURN and LORD HALSBURY from another aspect. If the plaintiffs show that they took all reasonable and proper care of the goods, the mere fact that they were, notwithstanding, stolen is not sufficient any longer to make them liable for negligence. Their explanation is, then, that the thieves must have shown ingenuity and daring against which reasonable precautions could not avail. Hence, I think the plaintiffs discharge the burden of proof upon them if they can show that the theft took place notwithstanding that they had taken all reasonable precautions to guard against the danger.

The point is this. If the bailees can show, as LORD DUNEDIN put it, that the loss may have happened consistently with the absence of negligence on their part, then they have discharged the burden. If it is something that could not happen without negligence on their part, the position is different. In that case, they were able to discharge the onus by saying : " We have shown that we have a reasonable system here. The theft has nevertheless taken place. It is just as consistent—the thieves being specially clever people, who could break in and steal these goods notwithstanding our system—with the absence of negligence as it is with negligence, and, therefore, we have discharged the onus which is upon us." LORD WRIGHT, M.R., had quoted certain passages from *Travers (Joseph) & Sons, Ltd.* v. *Cooper* (37). Goods had been loaded into a barge, and the barge, while lying alongside the wharf, had sunk. The barge-owners were being sued by the owners of the goods. PICKFORD, J., had tried the case in the first instance. It was proved that the man who ought to have been on the barge in charge of it had left the barge and was not there. There were two theories as to how the barge had sunk. Mud-sucking was one solution, and underpinning was the other. PICKFORD, J., had held that there was negligence proved because the man was not there, but he said, at p. 75:

> I have come to the conclusion that it is not proved to me that if he had been there he could have avoided the accident.

Accordingly, he found for the defendants. That decision was reversed in the Court of Appeal. BUCKLEY, L.J., says, at p. 87:

> They have proved negligence, but the learned judge has held that they fail because they have not proved that the negligence caused the loss. If the learned judge had enjoyed the assistance which we have of the decision of the House of Lords in *Morison, Pollexfen & Blair* v. *Walton* (3), decided on May 10, 1909, I doubt whether he would have decided this point as he did. The language of LORD LOREBURN, L.C., in that case seems to me to be directly in point. It was a case in which a firefloat, which was being towed, was lost, and the reason why she sank was unknown because there was no one on board her as there ought to have been. LORD LOREBURN, L.C., said: "Here is a bailee who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision and difficult to discover at all what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing he must make that loss good."

The same thing was said by LORD HALSBURY in *Morison, Pollexfen & Blair* v. *Walton* (38). If the plaintiff can prove negligence in the bailee, then it is for the bailee to prove that that negligence was not the cause of the loss. That principle was applied in *Travers (Joseph) & Sons, Ltd.* v. *Cooper* (37). I think that it will be sufficient if, in the interests of time, I read merely a few words from the judgment of PHILLIMORE, L.J., at p. 97:

> And this gives rise to the question, on whom was the burden of proof? It is here that I differ from the learned judge. I think he has imposed the burden of proof on the wrong party. I think that when the bailee of goods has to admit that the goods have been damaged while in his custody and in the absence of the custodian, and it is found that the absence was improper and negligent and that that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage.

The obligation was expressed in very guarded language, and it is based entirely upon the fact that the burden is on the bailee to explain everything if and when it is proved that he has been guilty of some definite negligence which might account for the accident. It is not for the plaintiff in such a case to prove that it did. It is for the defendant to prove that it could not. In *The Stranna* (39), LANGTON, J., again applied the same principle.

Applying to this case the principles to which I have referred, to what conclusion do the findings of fact lead me ? Para. 3 of the case describes the accident. No wonder that the arbitrator described it as of an unprecedented character. There was a boiler which was intact at the end of the explosion. There was an internal explosion which produced such extraordinary external pressure in one direction as to cause, without a breach in the boiler, the ship's far heavier boilers to shift 4 ft. to 5 ft. 6 ins. and yet at the same time propelled the boiler itself in which the explosion occurred 164 ft., through all obstacles in its path in the opposite direction. Paras. 7, 8 and 9 of the case must be referred to. I have read part of para. 7. The further part of para. 7 sets out the ultimate conclusion as follows :

> The explosion was one of an unprecedented character and no sequence of events . . .

which must include no sequence of events based even on negligence

> . . . which was other than improbable was suggested as capable of having given rise to it. The matter was rendered still more difficult by reason of the fact that the donkeyman who on the morning in question was the only person to be in the stokehold during the 90 minutes preceding the explosion was not available as a witness. He had been paid off in Australia about 3 weeks after the explosion. No report of his actions during this most material time had been asked for by the respondents and what he did or failed to do is a matter of mere surmise.

There is no suggestion that the owners had any reason for supposing that the evidence of the donkeyman would be material. I do not think that there is any suggestion of bad faith there. It is merely stating the fact, and the position is the same as it would be if he had been killed in the explosion itself and was not there to help.

Then para. 8 deals as follows with tubes :

> Considerable debate took place before me on the claimants' allegation that the stay tubes were corroded and excessively thin and that this condition had caused or contributed to the disaster.

It seems clear from the facts enumerated that some tubes had been renewed in 1934. In 1936, the boiler had passed the annual boiler survey. Para. 8 continues as follows :

> Though two of the 60 stay tubes had by reason of leaks been blanked off and stoppered at this date, no adverse comment on this known fact was made. During the remainder of the year, 10 more of these stay tubes leaked and were similarly stoppered. Before reaching Durban, the total of stoppered tubes was 7, and at that port 4 more leaked and received the same treatment.

This was reported to England, and the respondents made arrangements to fit a full set of new stay tubes on return to England. Then a twelfth leaked on Dec. 27. The arbitrator proceeds as follows :

> I find, however, that, owing to the impossibility of examining these tubes, it is the recognised practice that they are not renewed until they have shown by repeated

> leaks that they require renewal. The condition of the stay tubes at Port Pirie is no ground for a finding of negligence against the respondents' board or superintendent staff. Further, though the frequent failures should have indicated to the chief engineer that there was risk of further similar failures, the consequences of such failures reasonably to be anticipated would not be more serious than delay while the boiler was out of action, together with some risk of scalding men in the stokehold.

A I read that paragraph as clearing the respondents from any suggestion of negligence with regard to the tubes. There can be no negligence in the chief engineer. Of course, he must have appreciated that there might be similar failures. It must have been on his information, I imagine, that the new set had been ordered, but, however much he
B appreciated the presence of the corrosion, he was not responsible for it. Nobody was. That is clear. It is a wear-and-tear process which is inevitable. There it is. One cannot do anything about it until one gets the ship into a place where one can make renewals and put in a new set. All one can do, as soon as the tube leaks, is to blank it off
C in the way described. There is no danger to be apprehended from a leaking tube. That is proved by the practice which the arbitrator finds—namely, that these tubes are not renewed until it is shown by repeated leakage that they require renewal. It was not the boiler which feeds the ship's engine. It was only the auxiliary boiler. I do not
D see there any suggestion of negligence on the part of anybody on the ship. If anybody was negligent about that, it must have been the owners, who sent the ship out with tubes in such a condition that they could not properly see the voyage through, but negligence on their part was negatived. There is no negligence, however, on the part of people
E who have to do the best they can with what they have. The arbitrator proceeds in para. 9 as follows :

> Three principal theories of the disaster were formulated—namely, that, by an improbable collocation of events, an explosive mixture of coal-gas and air was formed in the starboard combustion chamber, that the explosion so caused administered a shock to both combustion chambers and fractured a number of
> F corroded tubes in the port tube nest, and that the port back tube plate, thus weakened, was rendered liable to be set down in the manner found.

There is a theory, not based on negligence at all, that the explosion took place before anything happened to the tubes. That explosion fractured the tubes. However, whether or not they fractured more readily, he
G has already found that the fact that they had corroded did not import negligence on the defendants' part. Therefore, the first theory advanced is a theory which rests upon no negligence on the part of the defendants, and none is established. The second theory was as follows :

> . . . that by reason of one or more of the acts of negligence alleged in the particulars
> H to para. 9 of the points of defence the water was allowed to get too low : that the top of the port combustion chamber thus became overheated (the starboard fire was out during the night of Jan. 2 to Jan. 3) : and that the disconnection of the port tubes resulted from ensuing buckling of the port back tube plate.

That is a theory based on negligence. Then the third theory was as follows :

> . . . that the initial explosion was due to some explosive substance accidentally

present in the coal, the explosion of which in the starboard furnace led to the same result as under (1).

How does the arbitrator go on ? He says in para. 10 :

> As to (1), I am not satisfied that the facts occurred as suggested. Accordingly, I am not satisfied that the condition of the tubes contributed in any way to the disaster. On the other hand, I consider this theory to be possibly correct, and, accordingly, am not satisfied that the corroded condition of the tubes did not contribute to the disaster. A

He has already said that all the suggested theories were not other than improbable, but what he is saying there is : " I cannot say as a fact that it happened in that way. Possibly it did. It is possible that the tubes had in some way contributed to the result, but I have already found that there has been no negligence on the part of the respondents *qua* B the tubes." Then, as to the second theory, he says :

> I am not satisfied that the facts occurred as suggested. I am not satisfied that any of the servants of the respondents were guilty of any of the negligence alleged. On the other hand, I consider the theory to be possibly correct, and, accordingly, I am not satisfied that negligence on the part of servants of the respondents did not cause or contribute to the disaster. C

Again, that is not putting it higher than this. There has been suggested a theory which may possibly be correct. It is an improbable theory. There is no evidence whatever to support it. I cannot say that it is not possibly correct. However, is possibility enough ? That has been disposed of long ago by WILLES, J., in *Daniel* v. *Metropolitan Ry. Co.* (40), D at p. 222 :

> It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to . . .

On appeal to the Exchequer Chamber, BLACKBURN, J., said, at p. 593 : E

> We entirely agree with the law laid down by the court below.

Possibility is not enough. Then in para. 11 the arbitrator proceeds as follows :

> I am not satisfied that the true cause of the disaster has as yet been suggested.

Therefore, it seems to me that in the result the position is this. Various F suggestions have been made, and various theories advanced, and none of them is other than improbable. The worst I can say against the defendants is that on one of these improbable suggestions it is possible that their negligence was the cause.

If it is right to apply the principles which I have been laying down, G the case against the respondents fails. It is plain that it has not been established that they were guilty of negligence, and there is no finding of any negligence. The worst finding against them is a possibility of negligence.

Can it really be described as a case of " self-induced frustration " ? H The value of the principle of frustration would be almost destroyed if the mere possibility of relevant default could deprive the person seeking to take advantage of it of that right. If, however, I am wrong in my view as to where the burden rests, in what words must the burden on the owner be expressed in the implied condition ? Is it really

to be a burden which is not discharged by a finding that there was no evidence of default, and that no default which was other than improbable could be suggested as a possible explanation of the accident? Is the burden to be still heavier than that? Is it to be a burden which is discharged only by proof that no default could possibly have contributed
A to the accident on any theory, however improbable? I cannot bring myself to think that. I am not going to frame the term which is to be deemed to be implied, but, even if there is on the shipowner some burden other than that implied by the ordinary principles of the law of negligence, I cannot think that the term to be implied must be so extreme as
B to prevent him from availing himself of the principle in a case like this. After all, the basis of an implied term is that it is supposed to be of such a character that, if it had been mentioned at the time of the contract, both parties would have said: "Yes. We both meant that. Put it in." Am I really to think that the shipowner would readily and as a
C matter of course have assented to the incorporation of a term which deprived him of the right of relying upon the doctrine of frustration unless he could prove in any circumstances that by no possibility could any negligence of his have accounted for the accident, on any theory, however improbable? In my opinion, on any view, the proper answer
D to the main question raised is that the burden has not been discharged, and that the claim ought to fail.

There are two other points raised with which I must deal. The respondents say that, if they are wrong about that, nevertheless they are entitled to rely on the exception of "accidents of navigation." I do not
E think that the clause applies before the contract voyage begins. Even if it does, I think that *The Southgate* (41), at p. 336, and *Svenssons (C. Wilh.) Travaruaktiebolag* v. *Cliffe S.S. Co.* (42) make it clear that this would not be "an accident of navigation." As to the other plea, concerning the incorporation of the Carriage of Goods by Sea Act, 1924,
F art. IV, para. 2 (*a*), even if those articles apply before the contract voyage has begun, to my mind they only refer to damage to goods. It is quite clear that, where they are in the Act, they refer to goods only. If one reads them into this charterparty, it does not seem to me that one is entitled to change their meaning, and I think that the principle of
G *Hamilton & Co.* v. *Mackie & Sons* (43) would apply. Even if one reads them in, one has to give them the same meaning as that which they have where they are in the Act, and, if that be so, they will not afford any assistance to the charterers. In the result, I answer the question in favour of the appellants here, the respondents in the arbitration, and I
H think that the claimants in the arbitration are not entitled to recover damages.

Judgment for the appellants.

Solicitors: *Holman, Fenwick & Willan* (for the appellants); *Parker, Garrett & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

LANDAU *v.* HUBERMAN AND OTHERS.

[COURT OF APPEAL (Scott and Clauson, L.JJ.), **March 11, 1940.**]

Emergency Legislation—Leave to enforce judgment for rent of business premises—Loss in partnership business attributable to war—No evidence as to private means of debtor—Information required by court—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (4).

A debtor carrying on a business in partnership who applies for relief under the Courts (Emergency Powers) Act, 1939, in respect of debts of the business must, in addition to proving that the business has been adversely affected by the war, give details of his private means and personal position, and must show that his own means are insufficient to make good the position of the business and that this is due to circumstances attributable to the war. The court cannot consider as adequate a statement that he has not any available private means. An affidavit stating that the debtor has no available private means is insufficient. He must produce evidence which establishes the position of his private resources, as, for example, a bank pass-book or an affidavit by an accountant who has investigated his private affairs.

[**EDITORIAL NOTE.** The principle of limited liability has been so generally adopted now that it is apt to be overlooked that partners are liable to be called upon to satisfy the creditors of the partnership out of their private assets. The present decision is not only a reminder of this, but goes on to show the general nature of the statement of the position in that regard which the courts require in an affidavit showing cause for relief under the Emergency Legislation.

AS TO EMERGENCY POWERS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

Case referred to:

(1) *A.* v. *B.*, [1940] 1 K.B. 217; [1939] 4 All E.R. 169; Digest Supp.

INTERLOCUTORY APPEAL by the defendants from an order of TUCKER, J., dated Feb. 16, 1940. The matter arose under the Courts (Emergency Powers) Act, 1939. Unconditional leave to proceed under that Act had been given by TUCKER, J., to enforce an order made against the appellants, reversing an order made by MASTER JELF, who had made an order that, on payment of a sum of £250 at once, the order should not be enforced so long as the appellants paid £100 per month until the amount owing was paid off.

John Senter (*Valentine Holmes* with him) for the appellants, the defendants.

Geoffrey Howard for the respondent, the plaintiff.

SCOTT, L.J.: This is an appeal from an order of TUCKER, J., who refused the application of the defendants, under the Courts (Emergency Powers) Act, 1939, for relief in respect of payment of rent and certain instalments due under a charge in respect of business premises, where the defendants carried on the business of retailers of ladies' costumes, gowns and similar goods. The defendants are individual persons, who are evidently carrying on business at that place in partnership. The rent payable under the lease, which is a lease from a mesne lessor, is £3,800 per annum, in addition to a premium of £11,000, of which £4,000 was payable upon the execution of the lease and the balance by instalments secured by a charge upon the lease. The defendants made an application under sect. 1 (4) of the Act, asking for relief in respect of their liability under a judgment in an action for arrears of rent and instalments due under the charge. Under that subsection, the court is given a discretion to modify the contractual rights and obligations of the parties. It is therefore essential that the court should be in possession of the fullest information necessary to enable it to exercise the jurisdiction conferred upon it.

The matter was dealt with fully in *A.* v. *B.* (1), which was a decision of the full Court of Appeal. The principles there laid down amount, however, in substance, to two propositions. One is that inability to pay has to be established. The other is that it must be established that the inability has been brought about by circumstances attributable to the war. In the present case, Master Jelf made an order in effect suspending the liability to pay the debts due on condition that a certain sum was paid down and instalments paid thereafter in each month. There was an appeal from that order to the judge in chambers, and Tucker, J., reversed the order of the master and gave leave to issue execution.

The defendants appeal to this court, and ask that the order of Master Jelf should be restored. It is obvious that each court ought to have equally full information with regard to the position of the defendants, and, if the defendants are individuals, as in the present case, that information should extend to their own personal assets and liabilities as well as those of the business itself. Information as to the effect of the war upon the business is contained in an affidavit put in by the defendants. It shows that, as regards the sale of ladies' costumes and gowns and similar articles, the direct consequences of the war have been very serious for the business. The way in which the war has affected the business is explained in one paragraph of the affidavit, and details are given in the next. On that aspect of the matter, a considerable degree of information is given. The statements are quite explicit, and the defendants show that the result of the war has been to diminish the sales very greatly. There was no application to cross-examine the defendants upon that affidavit, but there are other matters upon which the defendants should satisfy the court if they are to be given the privilege of having payment of their due debts postponed, or altered into payment by instalments. It is essential that they should give details of their private means and of their personal positions, and should show that their own means are insufficient to make good the position of the business. They must also show that that is due to circumstances attributable to the war. In the only paragraph of the affidavit which deals with that matter the defendants say that all their partners are concerned in other businesses, and that the business of one of the other businesses has suffered in a similar manner to the way in which that carried on at the premises in question has suffered, and that they have no available resources out of which they can pay the plaintiff the amount claimed in this action. They do not produce a bank pass-book, or any affidavit by an accountant who has investigated their private affairs and is able to give the court established information. We cannot consider the statement that they have not any available private resources as in any way adequate or sufficient to discharge the duty of an applicant to the court, and to enable the court to deal out justice to the creditor and the debtor. Parliament did not provide that debtors should be preferred to creditors. It provided that they should be preferred only where it is just, in the circumstances laid down in the Act. Where the inability of the debtor to make payment to the creditor is due to the war, the burden should be distributed between creditor and debtor in proportions which the court thinks fair. In the present case, in view of the insufficiency of the affidavit of the debtors with regard to their private means, the judge was right in setting aside the more indulgent order of Master Jelf, and this appeal must be dismissed with costs.

Clauson, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *George A. Herbert* (for the appellants, the defendants); *W. R. Bennett & Co.* (for the respondent, the plaintiff).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re WELLS, PUBLIC TRUSTEE *v.* WELLS.

[Chancery Division (Simonds, J.), **February 29, 1940.]**

Rentcharges and Annuities—Annuity given free of all deductions—Public Trustee appointed trustee of will—Whether free of deduction for income tax.

The testator by his will made in 1917 appointed the Public Trustee to be the trustee thereof, and bequeathed to his wife an annuity free of duties of £350, to be paid free of all deductions:—

Held: the annuity was not given free of income tax.

Re Cowlishaw, Cowlishaw v. *Cowlishaw* (6) *distinguished.*

[EDITORIAL NOTE. The decision in *Re Cowlishaw, Cowlishaw* v. *Cowlishaw* (6) appeared to depart from the principle laid down in a long line of authorities, and that case is here distinguished on the ground that, as the Public Trustee was the trustee of the will, and his income fee would, apart from a special direction in the will, have to be deducted from the annuity, there was a deduction to which the words in the will could apply.

As to Direction to Pay without Deduction, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-216, paras. 386, 387; and for Cases, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to:

(1) *Lethbridge* v. *Thurlow* (1851), 15 Beav. 334; 39 Digest 166, *575*; 21 L.J.Ch. 538.

(2) *Sadler* v. *Rickards* (1858), 4 K. & J. 302; 39 Digest 166, *576*; 31 L.T.O.S. 396.

(3) *Gleadow* v. *Leetham* (1882), 22 Ch.D. 269; 39 Digest 167, *581*; 52 L.J.Ch. 102; 48 L.T. 264.

(4) *Re Saillard, Pratt* v. *Gamble*, [1917] 2 Ch. 401; 39 Digest 167, *584*; 86 L.J.Ch. 749; 117 L.T. 545.

A (5) *Re Loveless, Farrer* v. *Loveless*, [1918] 2 Ch. 1; 39 Digest 167, *585*; 87 L.J.Ch. 461; 119 L.T. 24.

(6) *Re Cowlishaw, Cowlishaw* v. *Cowlishaw*, [1939] Ch. 654; Digest Supp.; 108 L.J.Ch. 196; 160 L.T. 455.

(7) *Re Shepherd* (1920), Unreported.

(8) *Re Bentley, Public Trustee* v. *Bentley*, [1914] 2 Ch. 456; 43 Digest 1035,
B *4761*; 84 L.J.Ch. 54; 111 L.T. 1097.

ADJOURNED SUMMONS to determine the question whether or not an annuity given to the widow of a testator was, upon the true construction of the will, given free of income tax. The relevant provisions of the will are set out in the judgment.

C *Wilfrid M. Hunt* for the plaintiff.

J. A. Plowman (for *J. Leonard Stone*) for the first defendant.

C. L. Fawell for the second defendant.

SIMONDS, J.: In this case, the testator, John Isaac Wells, died in
D Nov., 1918, having made his will on Oct. 9, 1917. The single question which arises for my decision on the construction of his will is the familiar one as to whether or not an annuity thereby given to his widow is, upon the true construction of the will, given free of income tax. The gift is in these terms:
E

> I bequeath the following annuities free of duties to commence from the date of my death to my said wife: an annuity of £350 during her life or widowhood to be paid free of all deductions by equal quarterly payments the first shall be paid 3 months after my death . . .

Then he goes on to give other annuities in similar terms, which are not
F material for the purposes of this decision.

From a long line of authority stretching from *Lethbridge* v. *Thurlow* (1), and including *Sadler* v. *Rickards* (2), *Gleadow* v. *Leetham* (3), *Re Saillard, Pratt* v. *Gamble* (4) and *Re Loveless, Farrer* v. *Loveless* (5), I should have had no doubt whatever that, upon the terms of this will, the annuity
G is not given free of income tax. There is no case amongst all those which have been cited to me where an annuity has been stated to be free of income tax, unless there is clear upon the face of the will an expressed intention of the testator that, when he refers to freedom from deductions, he is including income tax. *Re Cowlishaw, Cowlishaw* v.
H *Cowlishaw* (6) recently came before BENNETT, J., and the words to be construed in that will bear, it must be said, a remarkably close resemblance to those of the will which I have to construe. BENNETT, J., came to the conclusion that there the annuity was given "free of income tax." The great respect which I bear for the judge would, I think, have prevented me from putting a different construction upon this will,

but for two circumstances. In the first place, it appears from the report that the judge did not have the advantage of having cited to him a large number of authorities which counsel for the second defendant has cited to me, and, in particular, the judge did not have the advantage of being referred to *Re Shepherd* (7), before PETERSON, J., and the Court of Appeal in 1920. In that case, as in *Re Cowlishaw, Cowlishaw* v. *Cowlishaw* (6), which came before BENNETT, J., and in the case which I have to determine, there were two common features—namely, (i) a direction that the annuity should be free of all duties, and (ii) a direction that the annuity should be paid "free of all deductions whatsoever." Nevertheless, the Court of Appeal, affirming PETERSON, J., came to the conclusion that the annuity was not payable free of tax. In the second place, in addition to those authorities which were not called to the attention of BENNETT, J., I have here this distinguishing feature. Here the trustee appointed by the will is the Public Trustee, and accordingly the fees payable to the Public Trustee are payable under the statute. At the date when this will was made, it had been decided by ASTBURY, J., in 1914 in *Re Bentley, Public Trustee* v. *Bentley* (8) that the Public Trustee's income fee, which may be regarded as payable in respect of an annuity given by will, was properly payable out of the annuity. Accordingly, at the date when this testator made his will and thereby appointed the Public Trustee to be his trustee, there was a deduction which, according to the law as it then stood, was payable out of the annuity which he gave. It is therefore proper to assume that, when the testator gave an annuity free of duty, and then "free of all deductions whatsoever," he may have had in mind the deduction which, as the law then stood, would have been made from the annuity. It would be wrong, therefore, in this case to say, as BENNETT, J., found himself constrained to say in *Re Cowlishaw, Cowlishaw* v. *Cowlishaw* (6), that no meaning should be given to the words "free of all deductions." Accordingly, here I have a distinguishing feature which justifies me in saying that I need not follow the decision of BENNETT, J., in *Re Cowlishaw, Cowlishaw* v. *Cowlishaw* (6), and I declare that the annuity was not given "free of income tax."

Solicitors: *Minor & Co.* (for the plaintiff); *E. C. Kilsby & Son* (for the first defendant); *John Leigh, Wells & Co.* (for the second defendant).

[*Reported by* CHARLES NEWTON, ESQ., *Barrister-at-Law.*]

D'AMBRUMENIL *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Wrottesley, J.), **January 26, February 6, 1940.**]

Income Tax—Alienation of income—Covenant to pay annual sums to trustees—Obligation of trustees to lend whole amount to covenantor with or without interest—Whether alienation effective—Whether annual payments diminishing income—Income Tax Act, 1918 (*c.* 40), *s.* 27 (1) (*b*)*—Finance Act,* 1922 (*c.* 17), *s.* 20 (1) (*a*) (*b*).

Income Tax—Disposition for more than 6 *years—Covenant to pay specific amount for first year and three-quarters of actual income in each of* 8 *subsequent years—Necessary elements in annual payments—Whether annual payments diminishing income—Income Tax Act,* 1918 (*c.* 40), *s.* 27 (1) (*b*)*—Finance Act,* 1922 (*c.* 17), *s.* 20 (1) (*b*).

Under a deed of covenant, dated Feb. 4, 1937, the appellant covenanted to pay to trustees in respect of the year from Feb. 1, 1936, to Jan. 31, 1937, a sum of £20,000, and in respect of each subsequent year until the year commencing Feb. 1, 1945, a sum equal to three-quarters of his actual income from all sources. The payment of £20,000 for the first year was made, without deduction of tax, on Mar. 3, 1937, and on Apr. 4, 1938, a payment of £20,255 4*s.* 5*d.* was made in respect of the second year. On this occasion, the appellant paid the trustees £10,441 8*s.* 4*d.*, being the amount of £20,255 4*s.* 5*d.* less a deduction for income tax for the 2 years. On the same day, the trustees lent to the appellant a sum of £10,500 in accordance with an obligation under the deed to lend him such sums as he requested, with or without interest, and without responsibility for any loss of moneys so advanced. No payment was ever made to the beneficiary under the deed. The appellant contended that the two sums of £20,000 and £20,255 4*s.* 5*d.* respectively should be allowed as deductions in computing his total income for purposes of assessment to sur-tax for the 2 years in question. The respondents contended that, by reason of the provisions of the Finance Act, 1922, s. 20 (1) (*a*) (*b*), the two sums in question were to be deemed to be the income of the appellant, and were not admissible deductions in computing his liability to sur-tax for the 2 years, that there had been no effective payment and no effective charge on the appellant's income in either year, and that the whole transaction was a sham. Sect. 20 (1) (*a*) was repealed at a date before it could become applicable to the second amount:—

HELD: (i) the appellant was able, if he chose, without the consent of any other person, so to dispose of matters as to obtain for himself the beneficial enjoyment of the whole of the money. The first payment of £20,000 was, therefore, by reason of the Finance Act, 1922, s. 20 (1) (*a*), to be deemed to be the income of the appellant.

(ii) having regard to the terms of the trust which governed the trustees after payment, these sums did not constitute effective payments or annual payments reserved or charged whereby the appellant's income was, or might be, diminished under the Income Tax Act, 1918, s. 27 (1) (*b*), and were, therefore, not deductible in computing liability to sur-tax.

(iii) a payment of £20,000 in the first year, and of a constant fraction of the appellant's income in subsequent years, for a period of over 6 years was not the payment of income for a period of more than 6 years within the meaning of the Finance Act, 1922, s. 20 (1) (*b*).

[**EDITORIAL NOTE.** It is a common practice to grant annuities for a period exceeding 6 years, for the purpose of reducing the grantor's liability to income tax. It is here decided that there must be some constant element in such yearly payments of income, and there is no such element where, after payment of a definite sum in the first year, the subsequent payments are to be a constant fraction of the grantor's annual income.

As to Dispositions for a Period Exceeding 6 Years, see HALSBURY, Hailsham Edn., Vol. 17, pp. 269, 270, para. 538; and for Cases, see DIGEST, Supp., Income Tax, Nos. 576a-576e.]

Case referred to:

(1) *Inland Revenue Comrs.* v. *Mallaby-Deeley* (*Sir Harry*), *Mallaby-Deeley* (*Sir Harry*) v. *Inland Revenue Comrs.*, [1938] 3 All E.R. 463; Digest Supp.; *revsd. on the facts*, [1938] 4 All E.R. 818.

Case Stated under the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. Under a deed of covenant, dated Feb. 4, 1937, which recited that the appellant was anxious to make provision for Beatrice Philp, the appellant covenanted with trustees by cl. 1 to pay them the following annual sums:

(1) In respect of the year from Feb. 1, 1936, to Jan. 31, 1937, the sum of £20,000, such payment to be made on Mar. 31, 1937.

(2) In each subsequent year until the year commencing Feb. 1, 1945, a sum equal to three-quarters of the actual income received by the appellant in each year from all sources of income, such payment to be made in arrear on the following Mar. 31. The last payment under the deed falls due on Mar. 31, 1945.

Under cl. 2, the trustees were to hold the sums in question upon trust to accumulate them by way of investment, paying to Beatrice Philp such portion of the income arising therefrom as the appellant during his lifetime should direct, and accumulating the balance by investment. Under cl. 3, any sums falling due for investment were to be invested as the appellant directed, and the trustees upon the request of the appellant were to advance to him sums of money by way of loan, with or without interest, and without being responsible for any loss of moneys so advanced. The payment to the trustees under cl. 1 (1) of the deed was made on Mar. 3, 1937, when the appellant handed to the trustees bearer bonds to the value of £19,910 12*s*. 6*d*. and a cheque for £89 7*s*. 6*d*., making £20,000 in all. The payment due under cl. 1 (2) was made on Apr. 4, 1938, when the appellant paid to the trustees a cheque to the value of £10,441 8*s*. 4*d*., being an amount of £20,255 4*s*. 5*d*. due for the year to Mar. 31, 1938, less a deduction for income tax for the 2 years. The total amount received by the trustees was £30,441 8*s*. 4*d*. for the 2 years. On Mar. 3, 1937, the bearer bonds were transferred to the trustees' bank account, and the cheque for £89 7*s*. 6*d*. was paid into that account. On Apr. 4, 1938, when the cheque for £10,441 8*s*. 4*d*. was paid to the trustees, they lent the appellant upon his verbal request the sum of £10,500 under the terms of the deed. No payment under the deed was ever made to Beatrice Philp. It was contended on behalf of the appellant that the two sums of £20,000 and £20,255 4*s*. 5*d*. respectively should be allowed as deductions in computing his total income for the purposes of assessment to sur-tax for the 2 years in question. It was contended on behalf of the respondents:

> . . . (*a*) that by reason of the provisions of the Finance Act, 1922, s. 20 (1) (*a*), the sums of £20,000 and £20,255 4*s*. 5*d*. were to be deemed to be the income of the appellant.
>
> A (*b*) that in any case, by reason of the provisions of the Finance Act, 1922, s. 20 (1) (*b*), the sum of £20,000 was to be deemed to be the income of the appellant.
>
> (*c*) that there had been no effective payment and no effective charge on the appellant's income in either year.
>
> (*d*) that the whole transaction was a sham.
>
> (*e*) that the sums of £20,000 and £20,255 4*s*. 5*d*. were not admissible deductions in computing the liability of the appellant to sur-tax for the years ending Apr. 5, 1937, and Apr. 5, 1938.
>
> B (*f*) that the appellant had not proved his claims for the deductions, and that the appeal should be dismissed.

The decision of the special commissioners was as follows:

> We, the commissioners, held that, in view of the provisions of the Finance Act, 1922, s. 20 (1) (*a*) (*b*), the appellant was not entitled to deduct either of the sums of £20,000 or £20,255 4*s*. 5*d*. in computing his total income for the purposes of C assessment to sur-tax for the years in question. In our opinion, the payment of £20,000 on Mar. 3, 1937, made under cl. 1 (1) of the deed, bore no relation to the payment, made on Apr. 4, 1938, of the sum of £10,441 8*s*. 4*d*. under cl. 1 (2). We held that the appeal failed for both years, and adjusted the assessments in accordance with our decision.

Raymond W. Needham, K.C., and *J. S. Scrimgeour* for the appellant.
D *The Attorney-General* (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

WROTTESLEY, J.: Broadly speaking, by the Finance Act, 1922, s. 20 (1) (*a*) (*b*), Parliament enacted that, if a disposition of income E should be revocable, or not really effective, or should be for a period not exceeding 6 years, the income should be deemed, in spite of the disposition, to be income of the maker of the disposition for the purposes of sur-tax. The effectiveness of such a disposition must, of course, be judged by the words of this section, and the disposition which I have F to consider has in it certain elements which, as the Attorney-General contends, cause it to fall within both paragraphs of sect. 20 (1) (*a*) (*b*), which are as follows:

> (1) Any income (*a*) of which any person is able, or has, at any time since Apr. 5, 1922, been able without the consent of any other person by means of the exercise G of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition made directly or indirectly by himself, to obtain for himself the beneficial enjoyment; or (*b*) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after May 1, 1922 (other than a disposition made for valuable and sufficient consideration), is payable to or applicable for the benefit of any other person for a period which cannot exceed 6 years [is to be deemed, for the purposes of the enactments relating to sur-tax, H to be the income of the taxpayer].

Two questions arose at the hearing. First, are the sums of money—namely, the £20,000 paid on Mar. 3, 1937 (partly by bearer bonds and partly by cheque), and the £10,441 8*s*. 4*d*. paid on Apr. 4, 1938, together with the income tax thereon, £40,255 4*s*. 5*d*. in all—income of which the appellant has, since Apr. 5, 1922, been able, without the consent of any other person, by virtue of or in consequence of a disposition, to obtain for himself the beneficial enjoyment? That was the question argued at the hearing. They are—or, rather, were—income, and income of the appellant. Secondly, was this payment of £20,000 income which, by virtue of the deed, is payable to, or applicable for, the benefit of any other person for a period which cannot exceed 6 years? If by this the Act means beneficial enjoyment of this income *qua* income, the answer is in the negative, for the whole design of this deed is that this income shall go, anyhow in name, into a trust fund. Not less is it the design of this deed that it shall not remain there for a second longer than the giver wishes. The giver can at once borrow every farthing of it—possibly for ever, if in such a connection the word "loan" has any meaning, but certainly for 1,000 years—without interest, or security. Moreover, should the giver lose the whole of the money after borrowing it, the trustees are in no event to be liable. Beatrice Philp, the person for whose benefit the trust is apparently created, has no remedy against the trustees or the giver.

If I have the right to borrow—that is to say, to be paid—the whole of a man's income as fast as he receives it, against his will, on terms that I need not repay it in any period which interests either of us or our descendants to the twentieth generation, and need not pay him interest on it, or give him security, which of us can be said to have the beneficial enjoyment of this income, if I exercise those rights? It seems to me that in such a case the income benefits the borrower, and not the lender. The borrower enjoys. The lender may suffer. He certainly cannot be said to enjoy.

Bearing in mind the object of this legislation, I am not disposed to read into the section the words "as income." I have no doubt that in the case before me the appellant was able, if he chose, to obtain for himself the beneficial enjoyment of all this money. He was able so to dispose of matters that that income should benefit him, and that he, rather than Beatrice Philp, should enjoy it. It now turns out that sect. 20 (1) (*a*) was repealed at a date which makes it inapplicable to the second sum the subject of this case—namely, the £20,255 4*s*. 5*d*.—so that what has been said above applies only to the sum of £20,000 paid on Mar. 3, 1937. However, it leaves for consideration the question whether or not either of these payments, having regard to the terms of the trust which govern the trustees after payment, can be said to be an effective payment by the appellant—that is to say, an annual payment whereby the appellant's income was or might be diminished under sect. 27 (1) (*b*) of the Act of 1918. It seems clear that without a direction by the settlor, of which there is no evidence, and which never need be given, Beatrice Philp will never get the income of this so-called trust, and nor will the substituted beneficiary provided for in cl. 5 of the deed of covenant. Moreover, provided that the settlor exercises his right to ask for advances out of what was his own property

until it reached the trustees, he has only to ask to have his wish gratified, and by that means he controls, not only the income, but also the capital, of the trust. Can a payment made to the trustees in these circumstances and for such purposes be said to be an effective payment whereby the appellant's income is, or may be, diminished, or can it be said to be a
A charge on his income ? It seems to me that I cannot say that any such payment is an effective payment, anyhow until the appellant be dead, and what is necessary here is not a payment which becomes effective only if and when the settlor dies without taking back the money. There is, I find, no evidence upon which the commissioners could find that
B there was an effective payment. The payments to the trust fund found by the commissioners as facts are not, and do not purport to be, such payments.

The second question which arises concerns only the payment of the £20,000. Was this income which, by virtue of the deed, is payable to,
C or applicable for, the benefit of any other person for a period which cannot exceed 6 years ? What is meant by "income payable for a period" in this connection ? The appellant says that the amount is of no importance, and that, provided only some income is payable in respect of each of more than 6 years, this subsection does not apply,
D and that, for instance, the promise of a substantial payment in one year and of 6 nominal ones in subsequent years would be outside this subsection. Bearing in mind the object of this subsection, I think that the whole object with which a period of years was introduced by Parliament would be entirely set at nought by such an interpretation, quite
E apart from the fact that this case is covered by authority. To be deductible, the income must be payable for a period of over 6 years, and I think that there must be some constant element in such yearly payments of income. It may be that the constant element introduced by the promise of the same fraction of a man's income for the requisite
F number of years would be sufficient. In this case, the £20,000 has nothing in common with the subsequent payments, all of which are to be a constant fraction of the giver's yearly income. It is a sum payable for a period which cannot exceed 6 years—namely, one year. In coming to this conclusion, I think that I am in effect
G following the decision of LAWRENCE, J., in *Inland Revenue Commissioners* v. *Mallaby-Deeley* (*Sir Harry*) (1). That being the conclusion to which I have come, there will be no necessity, so long as my judgment stands, to remit this case to the commissioners.

Appeal dismissed with costs.

H
Solicitors: *Lovell, White & King* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

HUGHES *v.* B. G. UTTING & CO., LTD.

House of Lords (Viscount Caldecote, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Romer), **February 13, 14, March 12, 1940.**]

Income Tax—Profits—Speculative builder—Lease of house for premium and ground rent—Value of ground rent as trading profit—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I.*

The respondent company carried on the business of speculative builders, building houses upon land owned by them, and, upon the completion of the building, disposing of some of the houses by granting a 99-years' lease in consideration of a premium paid in cash and the reservation of a ground rent. The question raised in this appeal was whether the capitalised value of the ground rent should be brought into the company's profit-and-loss account as a trading receipt:—

Held: what the respondent company disposed of was not the houses but the leasehold interest, retaining the reversionary estate, and, until the realisation of the reversionary estate, the ground rent ought not to be brought into the company's accounts as a trading receipt. The ground rent was only taxable under Sched. A.

Order of Court of Appeal ([1939] 2 All E.R. 126) *affirmed.*

[**EDITORIAL NOTE.** This case has been distinguished from that of *Emery (John) & Sons* v. *Inland Revenue Comrs.* (1) in that in that case the land had been completely parted with and a rentcharge taken in its place. In the present case, the owner of the land had retained the fee simple, and all he had done was to demise the land for a long term in consideration of a small rent and a premium The effect of such a transaction is rather to place an incumbrance upon the ownership of the land than to part with any interest therein, since, after the determination of the lease, the successors in title of the present owners will again be seised of the land in fee simple.

As to Income Tax on Sale of Properties by Builders, see HALSBURY, Hailsham Edn., Vol. 17, pp. 100, 101, para. 194; and for Cases, see DIGEST, Supp., Income Tax, Nos. 122c-122f.]

Cases referred to:

(1) *Emery (John) & Sons* v. *Inland Revenue Comrs.*, [1937] A.C. 91; Digest Supp.; 156 L.T. 87; 20 Tax Cas. 213.

(2) *Californian Copper Syndicate, Ltd.* v. *Harris (Surveyor of Taxes)* (1905), 5 Tax Cas. 159; 28 Digest 23, case *b*.

(3) *Taxes Comr.* v. *Melbourne Trusts, Ltd.*, [1914] A.C. 1001; 28 Digest 18, case *92i*; 84 L.J.P.C. 21.

(4) *Church of Scotland Endowment Committee* v. *Provident Assocn. of London, Ltd.*, [1914] S.C. (Ct. of Sess.) 165.

Appeal from an order of the Court of Appeal (Scott, Clauson and du Parcq, L.JJ.), dated Mar. 16, 1939, and reported [1939] 2 All E.R. 126, allowing an appeal by the respondent company from an order of Macnaghten, J., dated Nov. 8, 1938, and reported [1938] 4 All E.R. 411. The facts and the arguments are fully set out in the opinions of their Lordships.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellant.

Raymond W. Needham, K.C., and *J. S. Scrimgeour* for the respondents.

VISCOUNT CALDECOTE, L.C. [read by VISCOUNT MAUGHAM]: My Lords, the respondent company carried on the business of developers of building estates, or, as the special commissioners have found, of speculative builders. In the course of its trade, the company dealt with some of the houses which it had built by granting a lease for 99 years. A ground rent of £9 or £10 was reserved by the company, and a premium was paid to the company by the lessee. The company retained the reversionary estate, and sought to bring into the computation of the profits and gains of the company for the year of assessment in respect of the houses their cost only (or market value if less than cost) until the sale of the reversion. No question now arises as to the premium. The respondent has accepted the decision of the Court of Appeal that this must be brought in as a trading receipt, and I do not doubt the correctness of the view taken by the Court of Appeal on the facts of this case. The position might be different if the consideration for the lease was represented by a premium, and only a peppercorn rent was reserved. On such a case, I express no opinion. The Crown's appeal concerns the capitalised or realisable value of the ground rent. It is claimed that this must also be brought into the company's profit-and-loss account as a trading receipt.

The argument for the Crown may be shortly stated. The respondent is said to have disposed of the houses in question by granting a 99-years' lease in return for (i) a premium, and (ii) a ground rent, or, at any rate, to have realised its whole interest for the term of 99 years. The ground rent must be regarded as money's worth, and is no different in principle from the premium. Money and money's worth alike must be brought into the account as a trading receipt, and the realisable value of the ground rents must be ascertained for the purpose of the account of profits and gains. The respondent company, on the other hand, denies that it has parted with the whole of its interest in the houses, even for the term of 99 years. As long as the reversionary estate is retained, the respondent company claims to be entitled to treat the houses as part of the stock in trade of its business.

My Lords, the key to the solution of this question seems to me to be found by keeping in view the real transaction. The Attorney-General laid emphasis on the word used by the special commissioners to describe what was done. He said that the respondent company disposed of its houses. What the respondent company disposed of was not the houses, but a leasehold interest, retaining the reversionary estate. The respondent company has not yet disposed of its property so far as the houses in question are concerned. It may do so at any time, and, the company being speculative builders, this is likely to take place sooner rather than later. When it sells the ground rent, it will sell the reversion, and the whole of the respondent company's estate will be converted into an asset which admittedly comes into the trading account. Until that happens, the company, which was the freeholder before the ground rent was created, and remained the freeholder after it was created, has only partly realised its property.

The decision in *Emery (John) & Sons* v. *Inland Revenue Comrs.* (1), which was much relied on by the Crown, rested on the basis that the builders disposed of their entire interest in the land, and in the houses built upon it, in return for cash and certain ground annuals. In the words of my noble and learned friend Viscount Maugham in that case, the right of ownership had been converted by the transaction in question into a different type of property—namely, ground annuals. In those circumstances, the ground annuals were required to be valued for the purpose of including the proceeds of the realisation of the property in the trading account, so as to compute the company's profits and gains. In the case before your Lordships, the builder—that is, the respondent company—has retained, as he has a perfect right to do, an interest in the houses of a real and substantial character. This is in the ordinary exercise of the trade or business of a speculative builder, who may have reasons for retaining the reversionary estate in any house or houses until he can realise them all together, or possibly under better market conditions. I see no reason or principle which compels him to pay tax on the capitalised value of the rents which he has reserved. My Lords, I find myself in complete agreement with the judgment of the Court of Appeal delivered by Clauson, L.J., and I think that this appeal should be dismissed with costs.

Viscount Maugham: My Lords, the question in this case may be very briefly stated. The respondents carry on the business of builders, contractors and developers of building estates. They have developed two estates by making roads, laying down sewers and drains, and building houses. In some cases, they have sold land with the houses for cash. In other cases, they have granted leases for 99 years in consideration of premiums and yearly ground rents of £10 per house, or thereabouts. The respondents have not sold any of the reversions in respect of which these ground rents are payable. Where the land and houses are sold outright, the amounts paid on them are brought into the respondents' accounts as trading receipts, while on the other side of the accounts the cost of the land and buildings sold is brought in as a trading expense. This is plainly on the footing that it is part of the respondents' business to build and sell houses. The premiums received where leases have been granted for 99 years have also been treated as trading receipts, and no question has been raised before this House as to that being correct. The question is whether the ground rents should not be valued at so many years' purchase and whether the amounts should not, like the premiums, be taken into account as trade receipts in the year in which the leases are granted.

My Lords, it is not in dispute that the respondents are a trading company, that part of their business consists of selling these lands and houses, and that the surplus realised by them on a sale of their assets at enhanced prices is a surplus which is taxable as profit under Sched. D. Nor is it in dispute that, if their land and buildings should be sold for consols or other investments, or for annuities, or for any other realisable property, the value of the property so obtained on the realisation of the assets in question must be ascertained, and that the profit on the transaction will be assessable under Sched. D: *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*) (2) and *Taxes Comr.* v. *Melbourne Trusts, Ltd.* (3), at p. 1010. It is clear, I think, that it is profit obtained on a realisation which is taxable in such a case. We have, therefore, to decide whether the reversions retained by the respondents in the lands and houses in respect of which the 99-years' leases have been granted ought to be treated as part of the proceeds of realisation of those properties or whether, on the contrary, those reversions are part of the unrealised assets of the respondents, with the result that, unless and until they are sold, the Crown cannot insist on their market value being brought into the profit-and-loss account of the respondents.

My Lords, I think we cannot shut our eyes to the fact that the reversions in question are in truth the freehold lands of the respondents, which have been parted with by them only in so far as long leases of the lands have been granted in consideration of premiums and annual rents. I am unable to see any essential difference between this case and a case where lands have been retained subject to a 21-years' lease which had been granted in consideration of a premium and a rent, or, indeed, a case where a lease has been granted at a rack rent. In any of these instances, the freehold interest is retained, and, when that interest is realised, the proceeds will be brought into account, and the profit, so far as not already accounted for, will come into the trading account.

We were urged to say that the freehold interests retained were in substance wholly new interests, and that, again "in substance," the respondents had parted with their rights in the lands for 99 years. This, of course, wholly neglects the legal aspect of the case, and, as I think, disregards also the popular and practical view of the position. The landlord in such a case has a good deal more than his right to the rent. The restrictive and repairing covenants which are entered into by the tenant are often of vital interest to the landlord, to the tenant, and even to the neighbourhood. The landlord may obtain, in cases of breach of covenant, an immediate right to re-enter. If the house is burnt down, his rights are sometimes of paramount importance. The Income Tax Acts have always proceeded on the basis that the owner of the reversion, even if leases at ground rents for long terms have been granted, is to be charged under Sched. A in respect of his "property in all lands, tenements, hereditaments and heritages" according to the annual value thereof.

My Lords, I do not think there is any real foundation for the argument that the respondents, in retaining their reversions, ought to be treated as having retained nothing but annuities for 99 years. In *Emery (John) & Sons* v. *Inland Revenue Comrs.* (1), that was, with unimportant differences, what the taxpayers had retained in the form of Scottish "ground annuals" payable in perpetuity, and it was precisely because they had A
parted with all right of ownership in the houses and land attached thereto that this House, affirming the Court of Session, held that the ground annuals must be included at their market value in the trading accounts for the purpose of ascertaining the profits made by the taxpayers in the year in question. It may be mentioned that ground annuals are B
very similar to rentcharges in England, and that LORD DUNDAS in *Church of Scotland Endowment Committee* v. *Provident Assocn. of London* (4) observed, at p. 172:

> But "ground annual" is not a *vox signata*; I think it simply means a perpetual rent-charge secured in some effectual fashion as a real burden on land. C

There is, I think, no difficulty in distinguishing the *Emery* case (1) from the one now before your Lordships. My Lords, I agree with the conclusion arrived at by the Court of Appeal, and with the reasons given for it. I am, therefore, of opinion that this appeal should be dismissed with costs. D

LORD RUSSELL OF KILLOWEN [read by LORD ROMER]: My Lords, I would dismiss this appeal. I cannot help thinking that some confusion may have been introduced into the case by the wording of the documents used by the respondents, when, instead of realising a plot at once, and in a single transaction, by parting with the fee simple, E
they demise it for a term of years, and keep unsold—at all events for the time being—the reversion expectant on the determination of the term. In the documents which they use on those occasions, the transaction is incorrectly described as a sale and purchase, which it most certainly is not. This, it appears to me, may have been the foundation F
of the statement by the commissioners that the company's houses, when completed, "are disposed of by the company by way of sale," and may have led the commissioners to regard the granting of a lease as a complete and final realisation by the company of its profit on that particular plot of land. G

My Lords, I cannot take that view. The value of the reversion, though no doubt directly related to the rent reserved by the lease, may vary from time to time, and the company has full power under its memorandum of association to retain the reversion unsold and to collect the rent. Until it sells the reversion (and the commissioners H
find that the company has not yet sold any reversions), the company has not ceased to be interested in the plot, and its profit on the realisation of the plot has not been finally ascertained.

This is not a case like *Emery's* case (1), in which the builders no longer retained any interest in the land. They had sold it out-and-out for a ground annual, the capital value of which at the date of the sale had of necessity to be brought into account for the purpose of ascertaining the amount of the profit made on the out-and-out sale. The vendors' whole interest had been converted from land into another type of property. In the present case, until the interest in the land A which the lessor has retained is sold, his whole interest has not been converted into another type of property, and his profit on the realisation of the plot cannot be said to have been ascertained. There is no present necessity, as in *Emery's* case (1), for bringing into account the capital value of the annual sum. That will, in effect, be brought into account B at the proper time—namely, when the reversion is sold, and the proceeds of that sale are credited to the trading and profit-and-loss account for the year in which the sale is effected.

Lord Wright: My Lords, I agree with your Lordships that the C appeal should be dismissed. I think that the reasoning of the judgment of the Court of Appeal delivered by Clauson, L.J., is correct. The claim of the Crown is admittedly novel. It is based on certain propositions, which, as I understand them, may be briefly stated as follows. The respondent, it is said on the appellant's behalf, is being D taxed as a trader under Sched. D. His trade is to dispose of completed houses, and his profits come from the difference between the cost of the production and the proceeds of realisation. If he sells the freehold outright, the position is clear. If he disposes of the house by a 99 or a 999-years' lease, it is equally clear that he is selling the house for a E composite, but still single, consideration, which consists of the premium and the ground rent. Both these elements, it is said, are on a parity. The premium is money, and the ground rents, which are immediately marketable, are money's worth, which should be expressed in terms of a sum in cash, and this sum should be added to the premium so as to F give a single sum, which will then correspond to the price when the freehold is completely realised. In the case of the long lease, it is said, the entire interest of the builder is, in fact, realised. The house goes out of his balance sheet, because, in a business sense, or in substance, he has no further interest in it. The cash premium and the realised G or realisable value of the ground rents take the place of the house. The freehold reversion is thus of no practical or business value. Such are the propositions advanced by the Crown.

I think that this way of putting the case is not sound either in law or in a practical or business sense. The speculative builder creates by H his expenditure certain assets, including completed houses. As long as the houses are not sold or otherwise disposed of, they go into his accounts at cost or at market value, whichever is lower. When the freehold is completely disposed of, the sums realised take the place of the house, and show a profit or a loss, as the case may be. When, however, instead of the house being sold, it is let on a long-term lease at a ground rent, there is, not a complete, but a partial, realisation. An interest is carved out of the freehold. The residue of the complete freehold estate is not disposed of, but is retained by the builder. That interest is the freehold reversion, which normally includes the right to the ground rent, the right to enforce the restrictive covenants in the lease, the right of re-entry for breach of covenants, and the right to resume possession at the end of the term. That is an estate which, in the case envisaged, is not traded away by the speculative builder. It is not correctly described as a new asset, but is a residue of the original asset. The house must now be represented in the accounts by the premiums and the freehold reversion, in practice often described as the ground rents, and entered at cost or at market value, whichever is lower. The speculative builder may find this method of disposing of the houses is, in certain cases, more convenient or profitable to him. He may keep the ground rents in hand until he decides to dispose of them. Until he does dispose of them, he cannot, in my opinion, be taxed on a profit on the footing that it has been realised in the year of charge when it has never been realised, and may never be realised at all. He cannot in such a case be taxed on a notional profit. When he does "sell the ground rents," the proceeds will then be brought into charge in the appropriate year. According to the evidence of the accountants, set out in the case, this is the practice commonly adopted. I think it is correct.

The Crown have argued that the issue is here determined by the findings of fact by the commissioners. It seems to be said that the business of the respondents is only to realise the houses, and not to hold them on rental, or to use them for income, as would be the case if they let them on a rack rent for a period, and, therefore, they must somehow be treated as if they had realised them outright in a case like that now in question. It is clear, however, that to grant a 99-years' lease is not *ultra vires* the respondent company, and the facts stated in the case show that, in the case of a substantial number of the houses, they are leased for 99 years, and not sold outright, and that that method of dealing is not infrequently adopted by the respondents. There is no evidence to justify a finding that the business of the respondents is in fact limited to selling houses outright.

I do not regard *Emery (John) & Sons* v. *Inland Revenue Comrs.* (1) as laying down any general principle, except perhaps that, in the particular circumstances of that case, a presently realisable value might be treated as if it had been turned into cash. That case turned partly on the particular character of ground annuals in Scots law and partly on the circumstances, in particular on the circumstance that the property was completely disposed of, and not leased for 99 years or some other period. I cannot treat it as governing this appeal.

LORD ROMER: My Lords, if the gentleman who attends to the conveyancing side of the respondent's business had been a little more familiar with the terms usually employed by the practitioners in that art, it is, I think, at least possible that your Lordships would never have been troubled with this case. It is, indeed, one that furnishes a remarkable illustration of the confusion which may result from the use of inaccurate language. Such language in the present case is to be found in the form of agreement that the respondents employ when they adopt the course of granting a lease of one of their houses, instead of disposing of it by way of sale. By such agreement, in which the proposed lessee is described as "the purchaser," the company purports to agree "to sell," and the lessee purports to agree to "purchase by way of lease," for the sum therein specified, the particular land and house in question. It then fixes the date for completion, and provides that, upon completion, a lease of the property will be granted to the "purchaser" for a term of 99 years, at the ground rent therein specified. The expression "a sale by way of lease," however, is a contradiction in terms. A sale is the antithesis of a lease. The owner of a freehold house may sell it or he may retain it. In the former case, he will receive in money, or, as in *Emery's* case (1), in money's worth, the value of the house based upon its income-producing potentialities. In the latter case, assuming that he does not occupy it himself, he will retain it as an income-producing investment, and will obtain the income by means of letting it upon lease. It would be wholly inaccurate in that case to say that he is "selling" the house by way of lease. He is doing nothing of the kind, whether the lease be short or long, and whether he exacts a premium, which is merely an anticipation of future income, or relies solely upon an annual or monthly or weekly rent.

The inaccurate language used in the agreements for a lease in the present case would, however, have been quite harmless had it not misled the inspector of taxes. Treating the agreements for a lease and the leases granted in pursuance of those agreements as being in truth what the agreements falsely described them as being—namely, sales of the houses in question—he not unnaturally asked himself what consideration had been received by the respondents on such sales, for without doubt the net proceeds of all sales effected by the respondents must be brought into account as trading receipts. To the question so put to himself by the inspector of taxes there could be only one answer, assuming that the leases were really sales. The consideration in each case consisted of the premium and the value of the rent reserved. When the matter was brought on appeal before the commissioners for the special purposes of the Income Tax Acts, they were equally misled. What they said was this:

> In the course of its trade, the company buys land, develops it, and builds houses thereon, and the houses, when completed, are disposed of by the company by way of sale.
>
> In some cases, houses and land are disposed of freehold. In other cases, leases for 99 years are disposed of at premiums and ground rents of either £9 15*s*. or £10 10*s*. per annum.

> Whichever method of disposal is adopted the transaction is a transaction in the course of the company's trading. . . . Upon the documents or facts before us, we hold that, where houses have been disposed of by way of 99-years' leases at ground rents, completed sales in the course of the company's trade have been effected, and, in our opinion, the proceeds of those sales must be brought into the company's trading accounts.

If these were findings of fact, there would be no more to be said. They are, however, erroneous conclusions of law, of which the origin is to be traced back to the inaccurate language employed by the gentleman to whom reference has been made in the first line of this opinion. What the commissioners should have concluded from the documents and facts before them was that the company in the course of their trade sometimes effected sales of their houses, but sometimes retained the houses and granted leases of them for 99 years in consideration of a premium and a rent. In the former case, the purchase consideration in money or in money's worth must be brought into account as a trading receipt. In the latter case, the premium must also be brought into account under Sched. D, Case I, as a trading receipt, if the Crown elects so to do, but the rent will represent a profit arising to the company in respect of which it is only taxable under Sched. A. A B C

That the premiums can be treated as a trading receipt under Sched. D, Case I, was decided by the Court of Appeal, and the correctness of such decision is not now challenged by the respondents. Their contention before that court had been that the premiums were " fines " within the meaning of Sched. A, Case II, r. 6. The Court of Appeal did not find it necessary to decide that point, in view of the fact that, if they were " fines," they became chargeable under Sched. D, Case III, by virtue of the transfer of such receipts from Sched. A to Sched. D effected by the Finance Act, 1926. The premiums, however, were certainly trading receipts of the respondents, and, as such, could, since the transfer, be taxed under Sched. D, Case I, if the Crown should elect so to do, even if they were fines, and could, as such, also be taxed under Sched. D, Case III. The court did not, however, treat the premiums as being the consideration received on a sale. It is no doubt true that, if a lease for 99 years, or for any other long term, were to be granted by the respondents at a peppercorn rent in consideration of a premium, the premium would almost certainly be equivalent to the purchase money which could be obtained upon a sale of the freehold, and the reversion would have no appreciable value. The reversion would nevertheless exist as an asset of the respondents, and the transaction, though in no way differing from a sale in its material results, could not even then be accurately described as one. For these reasons, I am of opinion that the appeal should be dismissed with costs. D E F G H

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Royds, Rawstorne & Co.* (for the respondent company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

FIFE COAL CO., LTD. *v.* YOUNG.

[House of Lords (Viscount Caldecote, L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Romer), **February 5, 6, 7, March 14, 1940.**]

Workmen's Compensation—Disease—Accident—Disease existing before date of incapacity—Workman incapacitated while working as packer—Dropped foot—Loss of power of dorsiflexion—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1).

For about a month prior to Apr. 27, 1938, the respondent's work was that of a packer employed in building pillars to support the roof of part of the appellants' underground workings, and his work necessitated continuous kneeling. During that month the respondent suffered from some loss of the power of dorsiflexion of the right foot, and on that date, Apr. 27, 1938, towards the end of his shift, he felt it numb. He finished his shift, however, and walked home with his father's assistance. From that date he was totally incapacitated for some months. His total incapacity was due to a condition diagnosed as dropped foot, a paralysis of the muscles of the leg caused by pressure on the peroneal nerve and preventing dorsiflexion of the foot, i.e., raising the front part of the foot upwards :—

Held : the respondent sustained a definite physiological injury in the reasonable performance of his duties, and as the result of the work in which he was engaged at the time of the injury, and such physiological injury, resulting in incapacity, was injury by accident arising out of and in the course of his employment.

[**EDITORIAL NOTE.** It has long been settled that injury due to disease may be an accident. The most recent statement of the law was in the judgment of the Court of Appeal delivered by Clauson, L.J., in *Oates* v. *Earl Fitzwilliam's Collieries Co.*, [1939] 2 All E.R. 498, at p. 502. The facts of the present case rendered it unnecessary finally to determine whether incapacity due to a disease of gradual onset and progressive development can be an accident within the meaning of the Workmen's Compensation Act, 1925. Here it was found that the disease, in so far as it produced the incapacity, was caused by the work which the man was doing on a particular day, but it is held that the fact that that disease may have been present in the man for a long time is irrelevant. If, therefore, a workman is capable of doing his work and, by reason of the nature of that work on a particular day, becomes incapable of continuing that work, there is an accident within the meaning of the Act, and it is not legitimate to consider that the same work on previous days will have been inducing an internal condition making the happening of the " accident " possible or likely. At the same time one question is reserved in this decision and that question is stated by Lord Atkin in a striking sentence : " Whether, to constitute an accident, each employment baccillus or flight of bacilli must have its own day, or whether the gradual effect of a succession of them in poisoning the system can be said to be injury by accident, is the question reserved in this decision."

As to Incapacity due to Disease, see WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 18-20 ; and for Cases, see DIGEST, Vol. 34, pp. 273-275, Nos. 2311-2324.]

Cases referred to :

(1) *Walker* v. *Bairds & Dalmellington, Ltd.* (1935), 153 L.T. 322 ; Digest Supp. ; 28 B.W.C.C. 213.

(2) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A.C. 443 ; 34 Digest 266, *2264* ; 72 L.J.K.B. 787 ; 89 L.T. 314 ; 5 W.C.C. 1.

(3) *Stewart* v. *Wilson & Clyde Coal Co.* (1902), 5 F. (Ct. of Sess.) 120 ; 34 Digest 270, case *2293 iii.*

(4) *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230; 34 Digest 464, *3799*; 74 L.J.K.B. 474; 92 L.T. 578; 7 W.C.C. 1; *affg.* S.C. *sub nom. Higgins* v. *Campbell & Harrison, Ltd., Turvey* v. *Brintons, Ltd.*, [1904] 1 K.B. 328.

(5) *Marshall* v. *East Holywell Coal Co., Gorley* v. *Backworth Collieries* (1905), 93 L.T. 360; 34 Digest 271, *2303*; 7 W.C.C. 19.

(6) *Walker* v. *Hockney Brothers* (1909), 2 B.W.C.C. 20; 34 Digest 273, *2311*.

(7) *Clover, Clayton & Co., Ltd.* v. *Hughes*, [1910] A.C. 242; 34 Digest 273, A
2316; 79 L.J.K.B. 470; 102 L.T. 340; 3 B.W.C.C. 275.

(8) *Falmouth Docks & Engineering Co., Ltd.* v. *Treloar*, [1933] A.C. 481; Digest Supp.; 102 L.J.K.B. 708; 148 L.T. 507; 26 B.W.C.C. 214.

(9) *Innes* (*or Grant*) v. *Kynoch*, [1919] A.C. 765; 34 Digest 272, *2308*; 88 L.J.P.C. 85; 121 L.T. 39; 12 B.W.C.C. 78.

(10) *Williams* v. *Guest, Keen & Nettlefolds*, [1926] 1 K.B. 497; 34 Digest 272, B
2310; 95 L.J.K.B. 676; 134 L.T. 459; 18 B.W.C.C. 535.

(11) *Steel* v. *Cammell, Laird & Co., Ltd.*, [1905] 2 K.B. 232; 34 Digest 271, *2302*; 74 L.J.K.B. 610; 93 L.T. 357; 7 W.C.C. 9.

(12) *Cole* v. *London & North Eastern Ry. Co.* (1928), 21 B.W.C.C. 87; Digest Supp.

(13) *Ormond* v. *Holmes & Co., Ltd.*, [1937] 2 All E.R. 795; Digest Supp.; 107 C
L.J.K.B. 21; 157 L.T. 56; 30 B.W.C.C. 254.

(14) *Partridge Jones & John Paton, Ltd.* v. *James*, [1933] A.C. 501; Digest Supp.; 102 L.J.K.B. 760; 148 L.T. 553; 26 B.W.C.C. 277.

(15) *Walkinshaw* v. *Lochgelly Iron & Coal Co., Ltd.*, [1935] S.C. (H.L.) 36; 28 B.W.C.C. 230.

D
Appeal by the employers from an interlocutor of the First Division of the Court of Session in Scotland. The facts and the arguments are fully set out in the opinions of Viscount Caldecote, L.C., and Lord Atkin.

Erskine Hill, K.C., and *A. G. Walker* for the appellants.

Arthur P. Duffes, K.C., and *James Walker* for the respondent.
E

Viscount Caldecote, L.C.: My Lords, this is an appeal from the
First Division of the Court of Session allowing an appeal from an award
of the sheriff-substitute of Fife and Kinross in an arbitration under the
Workmen's Compensation Act. The facts appear partly from a state-
ment by the sheriff-substitute of admissions at the bar by agents for the F
parties and partly from a note of facts found by the sheriff-substitute
to be proved. The two statements to some extent overlap. Notwith-
standing a submission by counsel for the appellants, towards the end
of his argument, that there should be a remit to the arbitrator for a
further statement, the facts seem to me to be clearly stated, and are G
sufficient to enable this appeal to be determined.

The claimant had been employed by the appellants for about a month
preceding Apr. 27, 1938, as a packer in building pillars to support the
roof of the underground workings at Kinglassie Colliery. At the place
where he worked, the height of the roof was only 2½ ft. to 3 ft., and the H
position he normally adopted in doing his work as a packer was a crouch-
ing attitude, with the outside of his right knee pressing on the pavement.
During the month for which the claimant was working as packer, he suffered
from some loss of power to dorsiflex his right foot, or, in other words,
to raise the front part of his right foot upwards. On Apr. 27, while

engaged in his ordinary work as a packer, towards the end of his shift he worked in the crouching position already described. After about 20 minutes, he felt his right foot numb. He finished his shift, and was then able to walk home, with the assistance of his father, who was working with him. The claimant consulted his usual medical attendant, A who diagnosed his condition as dropped foot. Dropped foot is a paralysis of the muscles of the leg caused by pressure on the peroneal nerve, which passes over the bone below the knee, and resulting in inability to raise the front part of the foot upwards. Incapacity from dropped foot arising in this manner is a comparatively rare condition. The B claimant claimed compensation in respect of injury by accident sustained on or about Apr. 27. His incapacity was admitted to have arisen out of and in the course of his employment, and the only question which your Lordships have to decide is whether, on these facts, the sheriff-substitute was entitled to find that the claimant's incapacity was not due to injury C by accident within the meaning of the Workmen's Compensation Act, 1925, s. 1. The First Division of the Court of Session held that the sheriff-substitute was not entitled so to find, and from that decision this appeal arises.

The phrase "injury by accident" as used in successive Workmen's D Compensation Acts has been the subject of repeated and elaborate discussion, and, in the course of the 40 years or more which have passed since the first decisions under the Act of 1897, it is possible, as LORD TOMLIN pointed out in *Walker* v. *Bairds & Dalmellington, Ltd.* (1), to trace a gradual but steady extension of its meaning. The early cases E seem to have been decided on the footing that the word "accident" was to be interpreted in the sense in which it was understood in policies of insurance as describing some event of a fortuitous and unexpected character. The first case which came to your Lordships' House was the case in which the workman had ruptured himself by an act of over- F exertion: *Fenton* v. *Thorley & Co., Ltd.* (2). The decision reversing the award of the arbitrator and the Court of Appeal was in favour of the workman. LORD MACNAGHTEN came to the conclusion, at p. 448, that the expression "accident" was used in the Act:

> . . . in the popular and ordinary . . . sense as denoting an unlooked-for mishap or G an untoward event which is not expected or designed.

He disapproved the use of the word "fortuitous" as a test, and, on the other hand, quoted with approval a passage from the opinion of LORD M'LAREN in *Stewart* v. *Wilson & Clyde Coal Co.* (3), at p. 122:

> . . . if a workman in the reasonable performance of his duties sustains a physiological H injury as the result of the work he is engaged in . . . [there] is accidental injury in the sense of the statute.

In the same case, LORD LINDLEY understood "accident" to be not a technical legal term with a clearly defined meaning. He said, at p. 453:

> Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produced hurt or loss.

These statements and the decision in favour of the workman opened the door to claims which up to that time had failed. It is easy to be wise after the event, but to-day *Fenton* v. *Thorley & Co., Ltd.* (2) seems a very clear case.

The anthrax case, *Brintons, Ltd.* v. *Turvey* (4), was much more difficult, as may be seen from the opinion of Lord Robertson, who with undeniable force protested against the extension of the definitions given in *Fenton* v. *Thorley & Co., Ltd.* (2) in such a way as to cover disease. In view of a later decision, to which I shall refer, it is of some interest to observe the opinion of Lord Robertson that nobody could think of saying that a man who had caught cold had met with an accident. Notwithstanding the protest of Lord Robertson, it was held that the workman who had contracted the disease of anthrax by infection while sorting wool had suffered "injury by accident."

The two cases, one of "beat hand" and the other of "beat knee," which came before the Court of Appeal very shortly after the decision of your Lordships' House in *Brintons, Ltd.* v. *Turvey* (4)—namely, *Marshall* v. *East Holywell Coal Co.*, *Gorley* v. *Backworth Collieries* (5)—followed a different line. They were each decided in favour of the employer on the grounds that the injury was the inevitable result of work long continued, and was not anything which could be described as having happened on a particular duty. *Walker* v. *Hockney Brothers* (6), the case of the man who gradually over a period of 5 years acquired paralysis by riding a carrier bicycle, was another decision in favour of the employer. There is no reason to doubt the correctness of the decisions in the three cases I have last mentioned. In all of them the facts were such as to make it impossible to identify any event which could, however loosely, be called an accident. In these cases, the workmen failed, not because a disease is outside the purview of the Workmen's Compensation Act altogether, but because the burden of proof that there had been an accident was not discharged.

When the workman's claim is in respect of a progressive disease, the difficulty of pointing to a definite physiological change which took place on a particular day is, in general, likely to be almost insuperable, and in 1906 Parliament, in the case of certain diseases, and later, by an enlargement of the schedule of industrial diseases, relieved the workman in the specified cases of this obligation. However, if the circumstances of any claim in respect of incapacity due to disease are such as to make it possible to discharge this burden, I see no reason for thinking that what is called a disease is different in principle from a ruptured aneurism, as in *Clover, Clayton & Co., Ltd.* v. *Hughes* (7), or heart failure, as in *Falmouth Docks & Engineering Co., Ltd.* v. *Treloar* (8).

The decision and the reasons for the decision given in your Lordships' House in *Innes* (*or Grant*) v. *Kynoch* (9) lend support to this view. There the workman was engaged in handling artificial manures which contained poisonous germs, and, on a day while doing this work, he became ill with blood-poisoning, and three weeks later died. It was impossible to say with certainty when the infection occurred, though it was probably some days before the man became ill. Lord Birkenhead, L.C., in referring to the fact that the particular time and place of the poisoning could not be definitely ascertained, said, at p. 772:

> . . . all that is material is that the infection should have been the result of contact at some one particular time and that this one particular time should have been during the course of the employment.

In the same case, Lord Buckmaster thought that a finding that the infection was due to the impregnation of germs acquired in the course of and arising out of the claimant's employment was not, as a matter of common sense, too remote, and brought the case within the decision in *Brintons, Ltd.* v. *Turvey* (4).

In two of the later cases, Atkin, L.J., plainly foreshadowed the further development of the meaning of accident. In *Williams* v. *Guest, Keen & Nettlefolds* (10), he felt himself bound by *Steel* v. *Cammell, Laird & Co., Ltd.* (11), a decision rejecting the claim of a workman who had gradually accumulated lead in his system, to arrive at a similar decision in the case of silicosis, which was not then a scheduled industrial disease. He abstained from expressing any final view as to what the position would have been if it were not for the lead-poisoning decision, though, on the authority of *Innes (or Grant)* v. *Kynoch* (9), he thought it was not necessary to prove the precise day, time and place at which the accident happened. In *Cole* v. *London & North Eastern Ry. Co.* (12), at p. 95, which was a case of injury by a dust disease, Atkin, L.J., referred to his observations in the silicosis case, and, notwithstanding his opinion that the legal definition of "accident" was gradually approximating to the conception of a disease, again felt himself bound by the earlier decisions to reject the workman's claim. In *Ormond* v. *Holmes & Co., Ltd.* (13), the workman was bound to fail, having regard to the finding that the work on which he was actually engaged when he collapsed from a stroke following high blood pressure "neither caused nor contributed to nor accelerated the second stroke." The case is merely an illustration of the necessity of establishing facts which justify a finding that the injury was due to some specific unlooked for mishap or untoward event. Where those facts are not proved, the workman cannot succeed, and it makes no difference whether the incapacity is due to such an injury as a rupture or sprain or to a disease. For instance, *Partridge Jones & John Paton, Ltd.* v. *James* (14) was a case where the workman's widow succeeded, in spite of the fact that the workman was suffering from a severe arterial disease. The basis of the decision that there had been injury by accident was that the heavy work in which he was engaged produced a fatal attack of angina pectoris. The statement of Lord M'Laren, to which I have already referred, was once more quoted with approval in the only opinion which was given in your Lordships' House.

Two other authorities mark the latest stage in the process which Lord

TOMLIN in *Walker* v. *Bairds & Dalmellington, Ltd.* (1) thought had reached its extreme limit. The workman, a colliery foreman, had died from bronchial pneumonia, caused by a chill contracted through exposure to cold and water while cleaning a sump. His widow was held entitled to an award, on the ground, as LORD TOMLIN said, that the disease—namely, the pneumonia—resulted from the sudden and unexpected A onset of a chill, contracted in conditions which were normal in carrying out his job in the accustomed manner, and had been frequently experienced by him on previous occasions without ill results. The onset of the chill was " an untoward event," and not " expected or designed."

Finally, in *Walkinshaw* v. *Lochgelly Iron & Coal Co., Ltd.* (15), a B brusher in a pit, who, though apparently in good health, had long suffered from heart and kidney disease certain to result sooner or later in a cardiac breakdown, and one day had to stop working owing to sudden pain and choking, succeeded. LORD TOMLIN said, at p. 234 :

C

> The hard work on which the claimant was engaged induced the breakdown of his enfeebled heart. This involved a definite change in his condition on Apr. 29.

My Lords, I find it impossible to distinguish in principle the present case from the case I have last mentioned. The pressure on the peroneal nerve during a spell of work on Apr. 27 brought about the paralysis of D the claimant's muscles which is described as dropped foot. I apply the test of LORD M'LAREN, often quoted, and always with approval. The claimant sustained a definite physiological injury in the reasonable performance of his duties, and as the result of the work he was engaged in at the time of the injury. The fact that, in the course of his work E for a month before the day when he first suffered from dropped foot, he had felt some loss of the power of dorsiflexion of the right foot seems to me in no way to affect his right to compensation. I agree with the opinions given in the Court of Session. Accordingly, I move that this appeal be dismissed with costs.

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My Lords, my noble and learned friends LORD THANKERTON and LORD RUSSELL OF KILLOWEN desire me to say that they concur in my opinion.

LORD ATKIN : My Lords, the question in this case is whether the G respondent proved that personal injury by accident arising out of his employment had been caused to him. I need not recapitulate the facts stated in the opinion of VISCOUNT CALDECOTE, L.C. I agree with his view of the findings of the sheriff-substitute. In the words of LORD FLEMING :

H

> What happened to him on Apr. 27 transformed him from a man who was not suffering from dropped foot into a man who was.

If this be the true result of the findings, I cannot see that any doubt that the man suffered an injury by accident can arise. It is a physiological change brought about by an undesigned untoward event happening in the employment, and, if the elements of suddenness or of the event happening on a specified day are material, those elements in this case exist. Accordingly, it is unnecessary to consider the forcible argument of counsel for the appellants that the facts in this case are analogous to the slow and continuous onset of a disease in the course of which A no event occurs of which place and time can be specified, and, as a result, according to the argument, no "accident" could have occurred. I reserve, therefore, any question affecting the necessity of being able to specify an event with details of time and place before concluding that there has been an accident.

B There are two topics, however, upon which I wish to make some remarks. 1. The legal conception of "accident" within the meaning of the Workmen's Compensation Act has undoubtedly been enlarged in the more recent decisions. Such a broadening of view was plainly foretold by LORD BIRKENHEAD, L.C., in *Innes* (*or Grant*) v. *Kynoch* (9), at pp. C 770, 771, as the result of the acceptance of the decision of this House in *Brintons, Ltd.* v. *Turvey* (4) that the invasion of a workman's body by a bacillus derived from the employment is an accident. In *Brinton's* case (4), it was anthrax. In *Innes'* case (9), it was streptococci derived from bone dust. 2. It is necessary to emphasise the distinction between D "accident" and "injury," which in some cases tend to be confused. No doubt the more usual case of an "accident" is an event happening externally to a man. An explosion occurs in a mine, or a workman falls from a ladder. It is now established, however, that, apart from external accident, there may be what no doubt others as well as myself E have called internal accident.

A man suffers from rupture, an aneurism bursts, the muscular action of the heart fails, while the man is doing his ordinary work, turning a wheel or a screw, or lifting his hand. In such cases, it is hardly possible to distinguish in time between accident and injury. The rupture F which is accident is at the same time injury, from which follows at once, or after a lapse of time, death or incapacity. The distinction between the two must be observed, however. The incidence of a bacillus may be an accident, and an accident arising out of the employment, as in the anthrax and the streptococci from bone dust cases. In such cases, the G employment gives rise to the bacillus. The fact that it finds a suitable entrance in an existing wound, scratch or other orifice which itself is not due to the employment is irrelevant. They may be "accidental," but, if that accident is not related to the employment, it matters not. On the other hand, the employment may give rise to the wound or H scratch through which a non-employment bacillus enters. In such cases, the accident has caused the wound or scratch which is the injury. Without the bacillus, the injury is trifling. With the bacillus, the injury becomes so aggravated that it causes incapacity or death. Compensation is awarded because the incapacity so caused is the direct result of the accident, just as, if negligence causes a wound, the negligent party has to pay in full, whether the wound heals or becomes infected from outside, excepting possibly cases where it could be said that a new agency intervened.

Whether, to constitute an accident, each employment bacillus or flight of bacilli must have its own day, or whether the gradual effect of a succession of them in poisoning the system can be said to be injury by accident, is the question reserved in this decision. In the present case, it may well be that the impact of the ground upon the knee in the crouching position due to the employment produced an injury each time it pressed upon the peroneal nerve, and so affected the foot muscles associated with that nerve. In such a case, there would be a succession of injuries due to accident by the untoward and undesigned pressure on the knee. However, whether or not that be so, there can be no doubt that on Apr. 27 the pressure on the knee for a period of 30 minutes resulted in the injury of " dropped foot." Whether that was the result of a series of preceding injuries appears to me to be irrelevant. In this discussion, I have not thought it necessary to deal specifically with the authorities. They are fully considered in the opinion of the Lord President, with which I respectfully and completely concur. I agree that the appeal should be dismissed.

Lord Romer: My Lords, I concur.

Appeal dismissed with costs.

Solicitors: *Beveridge & Co.*, agents for *Wallace Begg & Co., W.S.*, Edinburgh, and *J. A. McAra*, Glasgow (for the appellants); *Kenneth Brown, Baker, Baker*, agents for *J. & A. Hastie, S.S.C.*, Edinburgh, and *Macbeth, Currie & Co.*, Dunfermline (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

WILSON *v.* LONDON, MIDLAND & SCOTTISH RAILWAY. CO.

[Court of Appeal (Sir Wilfrid Greene, M.R., MacKinnon and Clauson, L.JJ.), **February 28, 1940.**]

Companies—Meetings—Annual meeting—Proxies sent by directors to larger stockholders to ensure quorum—Validity of practice—Directors also directors of other companies trading with company—Questions of internal policy—Companies Clauses (Consolidation) Act, 1845 (c. 16), *ss.* 64, 65, 76, 85, 86.

The directors of the respondent company before an annual meeting sent to stockholders holding stock of the value of £2,500 and over stamped proxies filled in with the names of the directors. The appellant, a smaller stockholder, who had not received a proxy, contended that all stockholders should be treated alike, and that the directors, in taking this course, were contravening the Companies Clauses (Consolidation) Act, 1845, ss. 64, 65, 76. He also contended that the directors, who were also directors of over 140 other companies trading directly and indirectly with the respondent company, were in the position of paid agents or commercial trustees in all these companies and were, therefore, contravening the Companies Clauses (Consolidation) Act, 1845, ss. 85, 86 :—

HELD : (i) the course taken by the directors in sending stamped proxies to some only of the shareholders was a pure question of the policy of the company and one with which the court could not interfere. If, as a matter of policy, the stockholders thought that the practice should be changed, they were entitled, if they could and subject to the statutory provisions, to secure the passing of a resolution to that effect at a meeting of the company.

(ii) the statutory provisions in that regard having been complied with, the interest of directors in the contracts of companies of which they were directors was purely a matter of policy for the company itself, and was therefore not a matter which the courts could consider.

[**EDITORIAL NOTE.** On the first point, the Court of Appeal have had an opportunity of considering a common practice by which large statutory companies arrange for the more economical transaction of the necessary business at the meeting of the company. Though the matter does not seem to have been one of any real legal difficulty, it is clearly one which the lay mind might think of substance, and the clear decision of the Court of Appeal will be very valuable as approving a method of transacting such business which saves such companies and the public generally considerable expense. On the second point, it will be remembered that SCOTT, L.J., recently pointed out (in *Cooper* v. *Luxor (Eastbourne) Ltd.* [1939] 4 All E.R., at p. 418) that directors of private companies owe a duty of single-eyed service to the company and must strictly observe the machinery and rules of the Companies Act. In the present case, there had been that strict observance, and the matter thus became one of the policy of the company.

AS TO PROXIES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 76, 77, para. 136 ; and FOR CASES, see DIGEST, Vol. 9, pp. 575-577, Nos. 3825-3849.]

Case referred to :

(1) *Peel* v. *London & North Western Ry. Co.*, [1907] 1 Ch. 5 ; 10 Digest 1155, *8181* ; 76 L.J. Ch. 152 ; 95 L.T. 897.

APPEAL by the plaintiff from an order of SIMONDS, J., dated Dec. 12, 1939. The appeal raised four points, but only two of them require reporting. The company issued stamped proxies to stockholders holding stock of the value of £2,500 and over. The names of directors were inserted in the proxies, and stockholders were asked, in the event of their not intending to be present at the annual meeting, to sign and return the proxies. The appellant complained that the smaller stockholders, of whom he was one, did not participate in this privilege. The appellant stated that his purpose was to endeavour to preserve the privileges of the smaller stockholders, to whom, in the present case, no proxies at all had been sent. He contended that it would not involve additional expense to send proxies to all stockholders, as they need not be stamped, and that he was fighting for equal rights and privileges for all stockholders. SIMONDS, J., dismissed the action on this point.

The appellant appeared in person.

C. E. Harman, K.C., and *A. Andrewes Uthwatt* for the respondent company.

SIR WILFRID GREENE, M.R. : The appellant on the first part of his appeal is complaining of a practice followed by the respondent company in connection with their annual general meetings. For those meetings the company send out to a certain class of stockholders notice of the meeting, accompanied by a stamped proxy form and a stamped envelope in which it may be returned to the company. Such forms and envelopes are only sent to stockholders holding stock to the value of £2,500 or more. The complaint made by the appellant—and, if he will allow me to say so, he has put his case with great clearness and without repetition, and he has made it perfectly clear to my mind what it is for which he is contending—is that the railway company ought to treat all the stockholders alike, and that, if they send a proxy form to one, they ought to send a proxy form to all. In other words, it is a question of all or none. The appellant is not saying that the small stockholders, if I may so call them, are entitled as of right to receive a proxy form at all, or a stamped proxy form. What he is saying is that, if the larger stockholders receive those advantages, the smaller stockholders should receive them too. If that contention were right, the exact form of relief which would be founded on it might require consideration. Would it mean that the proxy forms sent out, and the proxies given on those forms, were invalid, or would it merely mean that the directors of the company must not use the company's funds in sending out proxies to some, although they may indisputably use the company's funds for sending out proxies to all ? I need not discuss that question, because, in my judgment, the principle for which the appellant contends is one which has no legal foundation. This is not a case where, for the purpose of a controversy which is going to be discussed and fought at a meeting, the directors select certain classes of stockholders for a special approach, with a view to influencing votes, or something of that kind. No consideration of that sort arises in the present case. The reasons why the directors took this course, and do as a matter of practice take this course, are stated in the evidence, and in the judgment of the judge. There is no suggestion, and indeed there can be no suggestion, of any sinister or improper design on the part of the directors. They have taken this course because they honestly think that it is in the best interests of the company and the economical administration of the company's affairs that this system should be adopted. That view of the matter has been accepted by the judge, and, indeed, is not disputed. The principle for which the appellant argues is the perfectly dry but quite intelligible principle that all should be treated alike. I say intelligible because it is a thing which would appeal to many people, and with considerable reason. The view which I take upon it, however, is that the contention has no legal foundation. The question as to whether or not that course is to be followed remains, therefore, a pure question of the policy of the company. If the company by their directors choose to take that course, it is a course which as a matter of law, in the circumstances of the present case, the directors, in my judgment, are entitled to take. If, as a matter of policy, the stockholders think that that practice ought to be changed, they are entitled, if they can, to get that policy altered by the ordinary constitutional methods in the company itself. They have no right, however, to call for assistance from the courts, because the action of the directors has not infringed any right which those stockholders have, and has not A involved any improper use of the directors' powers or of the company's funds. In my opinion, therefore, the judge was perfectly right in his decision upon this part of the case, and the appeal on this part of the case necessarily fails.

B MACKINNON, L.J.: I agree.

CLAUSON, L.J.: I agree. I think that there is to be found in the judgment of BUCKLEY, L.J., in *Peel* v. *London & North Western Ry. Co.* (1) some observations which would be quite inconsistent with this C case being decided otherwise than the way in which it has been decided by SIMONDS, J. BUCKLEY, L.J., says, at p. 19:

> The true principle seems to me to be this: the company may legitimately do and may defray out of its assets the reasonable expense of doing all such acts as are reasonably necessary for calling the meeting and obtaining the best expression of the corporators' views on the questions to be brought before it. It may, or may D not, be reasonable to pay for stamps upon proxies. I expect that it is necessary. There are many people who, if they received a proxy without a stamp, would not take the trouble to return it. If it is sent with the proxy stamped and the return postage stamp affixed, very likely it will come back. Ascertain, as matter of reason and common sense, is this a reasonable thing to do to get the best expression of the popular voice? If it is, then it is not *ultra vires*.

Applying those observations to the present case, I think that it is most E important that, when the general meeting is convened, there should be present at it the necessory quorum. Otherwise the holding of the meeting would be abortive, and a large amount of expense in advertising and so forth which would have been incurred would be entirely thrown away. One of the first duties of the directors, I should think, is to F ensure that there shall be a quorum present. The quorum happens to be large. Perhaps it is not large when one considers the enormous capital of the respondent company, but still it is large. I think that we were told that there were holders of stock to the amount of £1,000,000. What the directors do is to send a stamped proxy to all holders who G hold stock to the value of £2,500 and upwards. The effect of that is, of course, that a large number of large stockholders return the proxies, and there will be a quorum present. It would, of course, be perfectly possible to send stamped proxies to all the holders, but the expense of that would be very great, and, if these large stockholders did not return H their proxies, there might very well not be a quorum at the meeting. The small stockholders may fill up and return their proxies, but it takes a good many small stockholders of stock valued at less than £2,500 to make up the necessary quorum. I make these observations only to show that what the directors have done seems, on the face of it, to be perfectly reasonable, and a thing which will give effect to that which it is their duty to give effect to—namely, with the least possible expense, to procure the presence of a quorum. However, the real point is whether or not their action in doing this has been *ultra vires*, because, unless it is *ultra vires*, the plaintiff cannot complain of it before this court. If it is only a question as to whether it would be wiser to take some other course, and whether it would not be more expedient to send out stamped proxies to all the holders, that is a question which must be a matter for the domestic tribunal to decide at the general meeting, and cannot be a matter in which this court can be called upon by the plaintiff to interfere. I venture to add these observations, but they are really, I think, perhaps not strictly necessary, because it appears to me that the grounds upon which the judge has based his judgment and the grounds upon which Sir Wilfrid Greene, M.R., in his observations has explained why it is the court feels bound to support it really cover the whole ground. I accordingly agree that the appeal on this part of the case fails.

The appellant also claimed a declaration that the directors of the company, who held over 140 directorships in other companies trading directly or indirectly with the company, and were in the position of paid agents or commercial trustees, were acting in contravention of the Companies Clauses (Consolidation) Act, 1845, ss. 85, 86. Simonds, J., also dismissed the action on this point.

The Court of Appeal heard and gave judgment on each of the points separately.

Sir Wilfrid Greene, M.R.: On this second point also the appellant has put his case clearly and with moderation, but the judge's judgment upon it is one which, in my opinion, is perfectly right, both as regards its conclusion and as regards the reasons upon which that conclusion is founded. The appellant has put before us numerous considerations which, he suggests, make it undesirable that the position of which he complains should continue. It is not the business of this court to consider questions of policy. It is the business of this court to administer the law. Whether or not within the four corners of what the law permits one or other alternative policy is preferable is something with which this court has no concern. Provided that those who are governing a public company are doing what the law tells them to do, and are not doing what the law forbids them to do, the other matters as to the method of running the company's affairs are matters of policy, which must be determined by the ordinary internal machinery of the company, without the interference of these courts. If the appellant thinks that the policy followed by this company is not a good one, he must endeavour, if he can, to get that policy changed. It is not for us to express any view whatever. It is not within our competence. I simply say that in order that he may appreciate—and I am quite sure he will appreciate it because he understands the case very well—the difference between what is legally permitted or legally forbidden and what is a pure matter of policy, with which the courts are not concerned. The matters in which he is particularly interested under this head, having regard to the decision of SIMONDS, J., which is affirmed by this court, remain purely as matters of policy. Therefore, we can neither deal with them A nor express any opinion upon them. This part of the appeal, therefore, must also fail.

MACKINNON, L.J.: I agree.

CLAUSON, L.J.: I agree.

B *Appeal dismissed on both points.*

Solicitor: *Alexander Eddy* (for the respondent company).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

C

B. SUNLEY & CO., LTD. *v.* CUNARD WHITE STAR, LTD.

[COURT OF APPEAL (Scott, MacKinnon and Clauson, L.JJ.), **February 2, 5, March 11, 1940.**]

D *Damages—Measure of damages—Breach of contract—Deprivation of use of chattel—Machine let on hire for short periods—Machine idle for one week through delay in transit.*

The plaintiff company secured a contract in Nov., 1937, to level the site of a new aerodrome in Guernsey. For the performing of such work it was necessary to remove a tractor and a scraper from a site at Doncaster to the site in Guernsey. The defendants contracted E to collect the machine at Doncaster on Nov. 10, 1937, and to transport it to Guernsey, where it should have arrived on the morning of Nov. 15. The defendants failed to carry out this contract as arranged, and the machine did not reach Guernsey until Nov. 22. The result was that the machine was kept idle at Doncaster for a week. The machine had been procured from America at a cost of £4,500, and, at the time of the above events, there were only very few such machines in England. F The plaintiffs claimed damages in respect of the machine being kept idle, and the defendants contended that they were entitled only to nominal damages and interest on the cost of the machine and overhead charges. There was no evidence that the machine's special work would have been accomplished any earlier had it not been a week late in arriving or that there had been any loss of profit:—

G HELD: the machine was a chattel of commercial value and there were 4 possible heads of damage: (i) depreciation, (ii) interest on money invested, (iii) cost of maintenance, and (iv) expenditure of wages thrown away. The plaintiffs could not complain if they were refused relief under heads (ii), (iii) and (iv) for they had not given any evidence on these legitimate topics. £20 would be allowed for depreciation, £10 for interest, maintenance and wages—in all £30—against which receipts H for £16 must be deducted, leaving a net sum for damages of £14.

Decision of HALLETT, J. ([1939] 3 All E.R. 641) *varied.*

[**EDITORIAL NOTE.** The question here is purely one of the measure of damages. Any unusual advantage or loss arising from a breach of contract is not generally a matter for damages, unless notice thereof is given to the other contracting party. Thus, the damages arising from the special features of the machine in this case appear too remote, but, in dealing with a commercial concern and an object of commercial utility, the loss of hire of the machine is a matter to be taken into account. It was held in the court below that the proper measure of damages was the amount the plaintiffs would have made by the use of the machine during the period it was idle, but the Court of Appeal have taken the view that, in the absence of proof of special damage, the plaintiffs can only recover nominal damages based largely upon a mathematical calculation of the rate of depreciation of this expensive machine. A

AS TO DAMAGES FOR BREACH OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 97-102, paras. 122-127 ; and FOR CASES, see DIGEST, Vol. 17, pp. 86, 87, Nos. 53-58.]

Cases referred to :

(1) *Mediana* (*Owners*) v. *Comet* (*Owners etc.*), *The Mediana*, [1900] A.C. 113 ; 17 Digest 79, *9* ; 69 L.J.P. 35 ; 82 L.T. 95. B

(2) *Hadley* v. *Baxendale* (1854), 9 Exch. 341 ; 17 Digest 93, *101* ; 23 L.J.Ex. 179 ; 23 L.T.O.S. 69.

(3) *Erie County Natural Gas & Fuel Co., Ltd.* v. *Carroll*, [1911] A.C. 105 ; 17 Digest 131, *385* ; 80 L.J.P.C. 59 ; 103 L.T. 678.

(4) *Mersey Docks & Harbour Board* v. *Marpessa* (*Owners*), [1907] A.C. 241 ; 17 Digest 86, *54* ; 97 L.T. 1 ; *sub nom. The Marpessa*, 76 L.J.P. 128 ; *affg.* S.C. *sub nom. The Marpessa*, [1906] P. 95. C

(5) *The Argentino* (1888), 13 P.D. 191 ; 17 Digest 82, *26* ; 58 L.J.P. 1 ; 59 L.T. 914 ; *affd. sub nom. Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino* (1889), 14 App. Cas. 519.

(6) *Clydebank Engineering & Shipbuilding Co.* v. *Yzquierdo y Castaneda* (*Don Jose Ramos*), [1905] A.C. 6 ; 12 Digest 434, *3514* ; 74 L.J.P.C. 1 ; 91 L.T. 666. D

(7) *Admiralty Comrs.* v. *Susquehanna* (*Owners*), *The Susquehanna*, [1926] A.C. 655 ; 41 Digest 802, *6624* ; 95 L.J.P. 128 ; 135 L.T. 456.

(8) *The Kingsway*, [1918] P. 344 ; 41 Digest 806, *6671* ; 87 L.J.P. 162 ; 122 L.T. 651. E

(9) *No. 7 Steam Sand Pump Dredger* (*Owners*) v. *Greta Holme* (*Owners*), *The Greta Holme*, [1897] A.C. 596 ; 41 Digest 808, *6689* ; 66 L.J.P. 166 ; 77 L.T. 231 ; *revsg.* S.C. *sub nom. The Emerald, The Greta Holme*, [1896] P. 192.

(10) *Liesbosch* (*Dredger*) v. *Edison* (*S.S.*), [1933] A.C. 449 ; Digest Supp. ; 102 L.J.P. 73 ; *sub nom. The Edison*, 149 L.T. 49. F

APPEAL by the defendants from the judgment of HALLETT, J., dated July 6, 1939, and reported [1939] 3 All E.R. 641. The facts are fully set out in the judgment of the court delivered by CLAUSON, L.J.

A. T. Miller, K.C., *A. J. Hodgson* and *W. J. K. Diplock* for the appellants. G

G. R. Blanco White, K.C., and *E. Holroyd Pearce* for the respondents.

Miller, K.C. : On the facts as found by the judge, the damages should have been nominal, as he has found that no damage was sustained or proved by reason of the delay. There is no question of any loss of hire or cost of any substitutes. There is no evidence that the contract to perform the work in Guernsey was delayed by the machine's absence for one week, so as to cause any specific pecuniary loss to the respondents, or to show that, if the machine had been delivered earlier, it would have been brought back to England a day earlier. The tractor was working at Doncaster for some time during the week it had been delayed there. H

The respondents must prove not only that they had not the use of the machine for the week, but also that they suffered loss in consequence. The respondents cannot be permitted to recover damages on guesswork or surmise: *Erie County Natural Gas & Fuel Co., Ltd.* v. *Carroll* (3), at p. 118. In the present case, the judge had no material on which to
A base the figure he awarded. He accepted the suggestion that, in the absence of any evidence of loss, he could take into consideration the amount at which the machine could be let on hire for a week. It was neither pleaded nor proved that the machine was late in getting back from Guernsey by reason of the delay.

B *Blanco White, K.C.*: Owing to the fact that the machine was delivered a week late, some damage must have been suffered by the respondents, as they were unable to proceed with the levelling of the ground. This type of claim frequently arises in connection with building contracts, where one often finds that a contractor suffers damage because
C an owner fails to supply him with an order necessary to enable him to proceed with the work. In the present case, the work was not stopped, as there were other men working on the site. To some extent, however, there must have been damage. It is not possible to quantify the loss, and claim special damage. That, however, is no reason why the
D respondents should not recover any damages. The third rule in *Hadley* v. *Baxendale* (2) admittedly does not seem to have been complied with. The respondents lost the use of the machine for a week, and are entitled to pecuniary compensation for that by way of general damages. In assessing damages, the court can consider what the rate of hire would
E be, if there were one. *Prima facie*, the damages would be the sum found by the court to be the pecuniary equivalent of the use of the machine for a week. A plaintiff is not obliged to claim and to prove special damage. There is no principle which requires a plaintiff to prove special damage by reason of the fact that he might be able to prove
F damage in that way. [SCOTT, L.J., referred to *Mersey Docks & Harbour Board* v. *Marpessa* (*Owners*) (4).] Special damage cannot be proved. The respondents would not have taken the machine to Guernsey unless it had paid them to do so. The respondents might have obtained £30 for the hire of the machine for a week. They must have suffered some
G damage on their contract by reason of the fact that the machine was delivered a week late. The court has to consider the measure of damages when special damage is not claimed. In such a case, it would seem to be the pecuniary equivalent of the value of the use of the machine. [CLAUSON, L.J., referred to *The Argentino* (5).] If a thing has a hire value, the
H hire value is some indication of the value of the use of the article to the owner. The measure of damages must be the commercial value of the hire of the machine for a week. The sum awarded by HALLETT, J., was not excessive. [Counsel referred to *Mediana* (*Owners*) v. *Comet* (*Owners etc.*), *The Mediana* (1), *Clydebank Engineering & Shipbuilding Co.* v. *Yzquierdo y Castaneda* (*Don Jose Ramos*) (6), *Admiralty Comrs.*

v. *Susquehanna* (*Owners*), *The Susquehanna* (7), *The Kingsway* (8), *No. 7 Steam Sand Pump Dredger* (*Owners*) v. *Greta Holme* (*Owners*), *The Greta Holme* (9) and *Liesbosch* (*Dredger*) v. *Edison* (*S.S.*) (10).]

Miller, K.C., in reply : It does not follow that, because the machine was delivered a week late, there must have been loss. On the judge's findings in this case, the only award should have been nominal damages. The respondents have not proved any actual loss of profits. There is no evidence that the respondents have suffered any loss at all. On the evidence, the machine made as much profit for the respondents as it would have done if delivery had been made to time. In *Gracie* (*Owners*) v. *Argentino* (*Owners*) (5), loss of profit-making time was proved. In the present case, there has been no proof of loss of profit-making time.

CLAUSON, L.J. [delivering the judgment of the court]: In this case, the plaintiffs were public works contractors. In Aug., 1937, they made a contract to level an aerodrome in Guernsey for a payment of £23,385. They had at Doncaster an excavating machine weighing over 22 tons. In Nov., 1937, the defendants agreed to transport this machine from Doncaster to Guernsey for £125. It was to be taken on a lorry by road to Liverpool and there put on board a ship named the Staghound, sailing on Nov. 12. The defendants got the road transport done by subcontractors. Unfortunately, they sent an unsuitable lorry, with the result that the machine only got to Liverpool in time to be put on board the Beryl, sailing a week later than the Staghound. The plaintiffs claimed damages for this week's delay. Before action, they claimed £577, and repeated that claim in their statement of claim. As £577 for a week is at the rate of £30,000 per annum for the use of a machine the cost price of which was £4,500 and which was part of the plant to earn £23,385 in all on this job, this claim is obviously extravagant.

The plaintiffs, having suffered a wrong, were entitled to damages—namely, such a sum as would put them pecuniarily in the position in which they would have been if the wrong had not been done to them. However, as it was the business of the plaintiffs to establish, if it were disputed, that the wrong had been done, so also it was the business of the plaintiffs to prove the amount of pecuniary loss occasioned to them. A great many witnesses were called by the plaintiffs. Unhappily, very little of their evidence was in the least relevant. It was, of course, the basis of the plaintiffs' claim that the machine had been left unused at Doncaster for the week in question. A witness, Hinchcliffe, called for the plaintiffs, said that this was untrue, and that it was worked for 46 hours. As he had communicated with the defendants, the question whether the machine had been worked at Doncaster naturally became important, as bearing on the honesty of the plaintiffs' claim. So much evidence was directed to this issue that the plaintiffs appear to have neglected to give any material evidence to prove their real damages. Eventually, the fact appeared to be that the machine did do one day's work at Doncaster and earned £16, and it was agreed that the plaintiffs must give credit for that sum against any claim they might establish. Of material evidence as to their claim, however, there was really none. It was proved that the machine cost £4,500 when new, and that its life was 3 years. There was no evidence as to when it was new, or how old it was at the time of this week's delay. The only evidence was that it stayed at work in Guernsey till August or September of the following year, when it went back to England. In answer to a question by the court, it was admitted that there was no evidence that its special work would have been accomplished any earlier had it not been a week late. If its cost was £4,500 and it lasted only 3 years, obviously its average rate of depreciation was about £29 per week. There was no evidence as to wages which were paid to the men in charge of the machine for this week, and so wasted, though no doubt some slight wage expense was incurred. There was some evidence that by letting such a machine at a later date the plaintiffs could earn £30 per day. It was not made clear, however, whether this was net profit or whether the plaintiffs had to pay the wages of the men employed to work it. There is a passage as to this which appears to suggest that, out of the £30, the plaintiffs would have to pay all the expenses of working it. What these expenses were is not clear. There are figures which we were told were so much per hour, and one may guess that this meant for an 8-hour day, for 11*s.* multiplied by 8 would be £4 8*s.*, which in 7 days would be a little more than the depreciation of £29, resulting from a 3-years' life of a machine costing £4,500. The plaintiffs asserted that in the week lost this machine would have worked 22 hours per day. In fact, it never did that till March or April of the following year, and, except for a vague declaration by one witness that the week's delay "humbugged it for the rest of the winter more or less, because we never got the job done till the spring, you see," there was no proof of the assertion.

In these circumstances, the plaintiffs really failed to prove any facts on which their damages could be estimated. In the absence of evidence, they relied on the law, and the judge unfortunately succumbed to the invitation to discuss at great length a variety of cases like *The Mediana* (1). Those cases establish that, when a plaintiff is deprived of the use of a chattel which he does not use for making profit, he is not to be debarred from claiming as damages what during that time its use would have been worth to him, had he not been prevented from using it. Those cases, however, are no authority for the proposition that, if the owner of a profit-earning chattel does not prove the loss he has sustained, the judge may make a fortuitous guess and award him some arbitrary sum. The judgment of the judge is lengthy, and is occupied with an elaborate discussion of these cases, which seem to us to be quite irrelevant, except on the broad principle stated by us, which is too well-known to need citation of authorities. His finding as to damages is in these terms, at p. 654 :

> . . . upon the whole, I feel that the lump sum figure at which I ought to arrive

> is £250. That is a lump sum figure arrived at in consideration of all the circumstances, and any attempts to analyse it by an analytical process will, I think, be doomed to failure.

When the judge warns us against the attempt to discover how he arrived at this figure, it is perhaps rash to act against his warning, but, as £250 per week is £13,000 per annum, it is at least startling to find that a machine which cost £4,500, and was employed as only one part of the plant on a contract to earn £23,385, in all was earning £13,000 per annum profit, whether net or gross, or that in its 3 years of life this machine costing £4,500 would earn £39,000. Upon the evidence as to the damage sustained by the plaintiffs by this one week's delay, we are satisfied that the sum of £250 is wholly erroneous. There was no evidence of any loss of profit on the Guernsey contract. The only real evidence was that the capital cost of the machine had been £4,500 and that its life was 3 years. Beyond this, there was nothing but the vague evidence about a hiring price of £30 per day. That, the judge says, should be reduced to £22 10*s*. by the saving of £7 10*s*. expenses. As no Sunday work was allowed in Guernsey, even this figure of £22 10*s*. multiplied by 6 equals £135. However, the judge has given £250.

The sole remaining question is whether or not there is any evidence of actual detriment to the plaintiffs caused by the week's delay. No evidence having been given by them of any loss of profit in connection with their Guernsey contract, their only possible claim must rest on the fact that, by the machine being suddenly thrown on their hands for a week, they were prevented from making it earn its keep, and had to put up with current outgoings uncompensated by earnings. The long judgment of the judge is almost entirely devoted to a discussion of leading cases upon first principles of the law of damages, especially in collision cases, like *The Mediana* (1), where the claimant ship was a non-profit-earning vessel. For the present case, such a discussion is unnecessary. It may be assumed—although it is not necessary for us to decide it—that, when loss of profit does not enter in as an element of loss, the measure of damages caused by a breach of contract for delay in delivery of a chattel is, under the first rule in *Hadley* v. *Baxendale* (2), not less than that in a claim in tort for temporary deprivation of the use of a chattel by the defendant's negligence.

The machine here was a chattel of commercial value, but, on the facts before us, there are only four possible heads of damage—namely, (i) depreciation which was running on, (ii) interest on the money invested, which was being wasted, (iii) some trivial amount of maintenance which was no doubt involved, and (iv) some expenditure of wages which were thrown away. The plaintiffs could not complain if they were refused any relief whatever on heads (ii), (iii) and (iv), for, having opened their mouth wide for a wholly illegitimate claim, they did not condescend to lead evidence on any of these three legitimate topics. On a pure sinking fund basis, the depreciation would be £29. We cannot believe, however, that a machine exposed to such working strains in use that it will last only 3 years depreciates as much when idle as it does when working, and we, therefore, think that £20 for the week is as much as ought to be allowed for depreciation. The sum of £10 for interest, maintenance and wages is liberal—say £30 in all—against which receipts for £16 must be deducted, leaving for damages a net sum of £14. The appeal must be allowed with costs, and the judgment below must be varied by entering it for the plaintiffs for £14, with such costs as that sum warrants. The claim ought to have been made in the county court.

Appeal allowed with costs.

Solicitors: *Hill, Dickinson & Co.* (for the appellants); *Munton, Morris, King & Co.* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* GLYN MILLS & CO.

[House of Lords (Viscount Caldecote, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Romer), **February 14, 15, 19, March 13, 1940.**]

Estate and Other Death Duties—Succession duty—Succession—Private Act of Parliament avoiding restraint upon alienation—Whether succession destroyed—Succession Duty Act, 1853 (c. 51), *ss.* 2, 12, 15.

Under a settlement of 1888, out of property brought into settlement by cousins of the deceased, the deceased was given a life interest subject to forfeiture in the event of alienation, and, subject thereto, the settled property was entailed in tail male in the usual form. In 1918, the entail was barred and the settled property made subject to the joint appointment of the deceased and his eldest son. At the same time, the settled property was resettled, the material clause of the resettlement being that the eldest son was given a power to charge the settled property with the payment after the death of the deceased of any sum not exceeding £50,000 free of death duties, such charge not to take effect unless the eldest son survived the deceased. By a private Act, passed in 1921, it was provided that the above power to charge might be exercised whether or not the eldest son survived the deceased, and that, notwithstanding the provision for forfeiture in the event of alienation, the deceased might release his life interest in any sum so charged. The Act also contained a general saving to His Majesty of all estate, right, title, interest, claims or demands. In 1923 and 1925, by three charges the sum of £50,000 was raised. The eldest son died on July 30, 1930. The deceased died on Oct. 3, 1932, and, this date being more than three years after the £50,000 had been raised, there was no claim to estate duty in respect thereof. The Crown contended that the charges were created under the settlement of 1888 and the resettlement of 1918 and claimed succession duty in respect of the £50,000 under the Succession Duty Act, 1853, ss. 2, 12, 15, upon a succession by the eldest son to the settlors in the 1888 settlement:—

Held: (i) the indefeasible title to the sum of £50,000 conferred on the eldest son was a new and paramount title derived from sect. 4 of the

private Act of 1921, and the private Act was not a "disposition" within the Succession Duty Act, 1853, s. 2.

(ii) the power conferred by sect. 4 of the Act of 1921 was a new power, distinct in law from that conferred by the resettlement.

Order of Court of Appeal ([1939] 1 All E.R. 236) *affirmed.*

[**EDITORIAL NOTE.** The substantial point in this case is whether the power conferred by the private Act was a new power or a mere variation of something A in the resettlement. It is well settled that acts done under a power of appointment are to be referred to the deed by which the power was created, and it was to bring that principle into operation that it was argued that the power created by the private Act was not a new power.

AS TO WHAT CONSTITUTES A SUCCESSION, see HALSBURY, Hailsham Edn., Vol. 13, pp. 349, 350, para. 383; and FOR CASES, see DIGEST, Vol. 21, pp. 84-89, B Nos. 601-651. FOR THE SUCCESSION DUTY ACT, 1853, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, p. 53.]

Cases referred to:

(1) *Braybrooke* (*Lord*) v. *A.-G.* (1861), 9 H.L. Cas. 150; 21 Digest 94, *694*; 31 L.J.Ex. 177; 4 L.T. 218; *varying* (1860), 5 H. & N. 488. C

(2) *A.-G.* v. *Floyer* (1862), 9 H.L. Cas. 477; 21 Digest 86, *622*; 31 L.J.Ex. 404; 7 L.T. 47; *revsg.* (1861), 7 H. & N. 238.

(3) *Charlton* v. *A.-G.* (1879), 4 App. Cas. 427; 21 Digest 95, *699*; 49 L.J.Q.B. 86; 40 L.T. 760; *affg.* (1877), 2 Ex.D. 398.

(4) *A.-G.* v. *Sibthorp* (1858), 3 H. & N. 424; 21 Digest 94, *693*; 28 L.J.Ex. 9; 31 L.T.O.S. 218. D

(5) *A.-G.* v. *Selborne* (*Earl*), [1902] 1 K.B. 388; 21 Digest 102, *753*; 71 L.J.K.B. 289; 85 L.T. 714.

APPEAL by the Crown from an order of the Court of Appeal (SIR WILFRID GREENE, M.R., FINLAY and LUXMOORE, L.JJ.), dated Jan. 23, 1939, and reported [1939] 1 All E.R. 236, reversing an order of E LAWRENCE, J., dated July 8, 1938, and reported [1938] 3 All E.R. 605. The facts and the arguments are fully set out in the opinion of VISCOUNT MAUGHAM.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *J. H. Stamp* for the appellant. F

J. M. Gover, K.C., and *J. H. Bowe* for the respondents.

VISCOUNT CALDECOTE, L.C. [read by VISCOUNT MAUGHAM]: My Lords, I have had the advantage of reading the opinion which my noble and learned friend LORD MAUGHAM is about to deliver. I agree with G it, and, having regard to the very full discussion by my noble and learned friend of the arguments presented to your Lordships, I find it unnecessary to add any observations. This appeal should be dismissed.

VISCOUNT MAUGHAM: My Lords, the present appeal is from an H order of the Court of Appeal, delivered by SIR WILFRID GREENE, M.R., on Jan. 23, 1939, allowing an appeal by the respondents from an order made by LAWRENCE, J., upon an English information. The question raised is whether succession duty is payable upon the death of the fourth Baron Wolverton (whom it will be convenient to call the deceased) in respect of a sum of £50,000 raised and paid in his lifetime to his now deceased son, George Edward Dudley Carr Glyn (whom I will call George Glyn).

The facts are conveniently set out in the information, and I think it unnecessary to repeat them at any length. The original settlement was dated Dec. 31, 1888 (herein called the 1888 settlement), and was made by cousins of the deceased, who settled personal property upon trust for investment in the purchase of freehold hereditaments to be settled to the use of the deceased for life (subject to a provision for forfeiture in the event of alienation), with remainder to the use of his first and every other son successively in tail male.

By a disentailing deed, dated Dec. 30, 1918 (which I will call the disentailing deed), George Glyn, the eldest son of the deceased (with the consent of the deceased as protector of the 1888 settlement), disentailed the settled property, and conveyed it (subject to the life estate of the deceased) to such uses and upon such trusts as the deceased and George Glyn should by deed jointly appoint, and, subject thereto, to the use of, or in trust for, George Glyn absolutely.

By a resettlement, dated Dec. 31, 1918 (which I will call the resettlement), the deceased and George Glyn in exercise of the joint power conferred upon them by the disentailing deed appointed that, subject to the life estate of the deceased, the freehold settled property should go to such uses as they should by deed jointly appoint, and, subject thereto, to the use of George Glyn for life, with remainders over. The resettlement also dealt with the settled investments by providing that, subject to the prior interests therein during the life of the deceased and otherwise, they should be held as to part upon trust for George Glyn absolutely if he should survive the deceased, and, subject thereto, upon the same trusts as capital money arising from the settled freeholds under the Settled Land Act, 1882. Clause 9 of the resettlement empowered George Glyn to charge the settled property with payment after the death of the deceased of sums not exceeding £50,000 free from death duties for the benefit of himself or any other persons, with the important proviso that any such charge should not take effect unless George Glyn should survive the deceased. This event did not happen, for George Glyn died on July 30, 1930, in the lifetime of the deceased, who died on Oct. 3, 1932.

In 1921, a private Act of Parliament known as the Wolverton Estate Act was passed. It recited (among other things) the 1888 settlement, the disentailing deed, the resettlement, and the restraint on alienation affecting the life interest of the deceased under the 1888 settlement. It also recited that it was :

> . . . expedient that the power conferred on George Glyn if he should survive Lord Wolverton of charging the property subject to the 1888 settlement and the resettlement with the payment after the death of Lord Wolverton to himself of any sum not exceeding £50,000 . . . should be varied in manner hereinafter mentioned [and that] the purposes aforesaid cannot be effected without the authority of Parliament.

Sect. 4 of the Act provided, first, that, notwithstanding anything contained in cl. 9 of the resettlement, or in the proviso thereto, George Glyn with the consent in writing of the deceased might:

> . . . exercise the power of charging conferred upon him by the said clause so that any charge made under that power shall take effect after the death of Lord Wolverton [the deceased] whether George Glyn shall survive Lord Wolverton or not. A

Secondly, sect. 4 provided that, notwithstanding the restriction on the deceased's life interest under the 1888 settlement, the deceased might:

> . . . release or assign and transfer to George Glyn . . . his life interest in the whole or any part of any sum so charged as aforesaid so as to enable the said sum B to be raised and paid during the lifetime of Lord Wolverton.

Sect. 12 provides that no exercise of the powers conferred by the Act shall work a forfeiture of the life estate of the deceased.

By indentures dated Nov. 29, 1923 and Nov. 4, 1925 (which I shall call the charging deeds), George Glyn, in exercise of the power conferred C upon him by cl. 9 of the resettlement, as extended by sect. 4 of the private Act, and with the consent of the deceased, charged the settled property with sums amounting in the whole to £50,000 free of death duties for his own absolute benefit, whether he survived the deceased or not. The deceased, by indentures dated Nov. 30, 1923, and Nov. 5, D 1925, released his life interest to the extent necessary to make these charges immediately operative, and the sums amounting to £50,000 were paid by the trustees of the settlement to George Glyn.

On these facts, the contention of the Crown, rejected in the Court of Appeal, is that the £50,000 received by George Glyn was a "succession" E taken by him under a "disposition" (consisting of the disentailing deed and the resettlement and the charging deeds), that this disposition was, therefore, "made by himself," that the Succession Duty Act, 1853, s. 12, is applicable, that his title to the succession was, within sect. 15 of the Act, "accelerated" by the releases by the deceased of his prior life F interest, that the successors are chargeable at the same rate as that at which George Glyn would have been chargeable if no such "disposition" had been made—that is, as if he were taking directly from the 1888 settlement—and, accordingly, that the successors are chargeable with duty at 11½ per cent. upon the death of the deceased. G

The respondents rely on sect. 4 of the private Act, and say that George Glyn took "a new and paramount title" derived from that section, which they say conferred a new power upon George Glyn, exercisable with the consent of the deceased, and, accordingly, that it is impossible to hold that he took under the "disposition" contained in the 1888 H settlement and the resettlement, or that contained in the disentailing deed and the resettlement.

My Lords, I think, subject to a question as to the true construction of sect. 4 of the private Act, that this case is in effect governed by the decisions of this House in *Braybrooke (Lord)* v. *A.-G.* (1), *A.-G.* v.

Floyer (2) and *Charlton* v. *A.-G.* (3). The Succession Duty Act, 1853, was no doubt, as has often been observed, a skilfully drafted Act, but it raised questions of remarkable difficulty, and, for my part, I must admit that I should probably have misunderstood some of the results of the first case without the assistance of the other two.

In the *Braybrooke* case (1), X, a stranger in blood, devised lands to A for life, remainder to B for life, remainder to the first and other sons of B in tail. A died, and B became tenant for life, with remainder to C, his eldest son, in tail. In 1841, B and C disentailed, and resettled the estates, subject to B's life estate, to such uses as B and C should appoint, and, in default, if C should survive, to such uses as he should appoint, and, in default, to C for life, remainder to his first and other sons in tail. In 1850, for various considerations not material for the present purpose, B and C exercised their joint power, and appointed the estates, subject to certain annuities and charges, to the same uses as had been declared by the deed of 1841. B died in 1858. In this House, LORD CAMPBELL, L.C., and LORD KINGSDOWN (LORD WENSLEYDALE dissenting) decided in terms or by necessary inference a number of points. First, they held that C took under a disposition " made by himself." Secondly, they held that this disposition was made by himself *alone*, because he alone was the settlor from whom the interest was derived, and he was, therefore, the sole predecessor. (This is not very clear from *Braybrooke's* case (1), but it was made clear in *Floyer's* case (2), at pp. 488, 495.) Thirdly, they held that the succession did not in fact take place under the will of the testator, because the deeds of 1841 and 1850 had created quite different interests in the estates from those created by the will, so that " the testator could no longer be considered as the predecessor " (at p. 168). Fourthly, they held that the deeds of 1841 and 1850 together constituted one disposition, because " what is done under a power of appointment is to be referred to the deed by which the power was created " (at p. 167). Fifthly, they said that, " at the date of the disposition " consisting of the two deeds of 1841 and 1850, C would have been entitled to the estates under the will of X expectantly on the death of B, and, accordingly, they held that he was to be charged under sect. 12 of the Act " at the same rate as he would have been chargeable with if no such disposition had been made," and that was, in the circumstances, at the rate of 10 per cent. as upon succession from a stranger (at pp. 168, 488). It will be observed that, in holding that C took under a disposition by himself, the House declined to treat the disentailing deed and the deed of 1850 as modifications or variations of the original settlement by will, so that the testator might be treated under sect. 2 as the direct predecessor of C. That view had had support from both bar and bench in *A.-G.* v. *Sibthorp* (4), but it was rejected in this House at pp. 167, 168.

It should also be noted that the first branch of the Succession Duty Act, 1853, s. 4, was not relied on, and that, although the language of that section would have exactly applied to the exercise of the power by C, whether it was treated as exercised by him alone or as exercised by B and C jointly. This was not fully explained until 1879, when this House decided in *Charlton* v. *A.-G.* (3) that the Succession Duty Act, 1853, s. 4, did not apply to a power given in a family settlement to a father and son, and that the section "pointed to an absolute power practically equivalent to property." This conclusion, I think, was arrived at partly at least because in *A.-G.* v. *Floyer* (2) the decision reached was that it was sect. 2, and not sect. 4, which governed such cases (at pp. 438, 442, 445). This decision shows that sect. 4 has no application to the present case. One other decided point should be referred to—namely, that charges or portions created under a power are treated in substance "as part of the inheritance out of which they are derived," and that the duty on these sums must "follow the fate of the inheritance." As Lord Cranworth observed in *Floyer's* case (2), at p. 491:

> The interest created by the power must, on well known principles, be treated as arising from the deed creating the power . . .

(See also *Floyer's* case (2), at p. 497.)

I come now to the facts in the present case. The authorities cited show that, before the passing of the Act of 1921, if Lord Wolverton had died, and George Glyn had survived him and exercised his power of charging, there would have been a succession in respect of which George Glyn was the predecessor under the disposition (by the disentailing deed and the resettlement and the charging deeds) made by himself alone. Sect. 12 would then have applied, and duty would have been chargeable as if those deeds had not been executed.

In the view put forward on behalf of the Crown, the circumstance that the charges derived their validity, in the events which happened, from sect. 4 of the private Act makes no difference, and it was contended that the £50,000 received by George Glyn was a succession taken by him as the result of his exercise of the power (modified, it was admitted, by sect. 4 of the private Act) contained in cl. 9 of the resettlement. Accordingly, the information (para. 11) claims that succession duty became payable at the death of the deceased in respect of the £50,000 under the Succession Duty Act, 1853, ss. 2, 12, 15, as a succession taken by George Glyn under dispositions contained in the 1888 settlement and the resettlement as effectuated by the charging deeds and accelerated by the two releases. It was also argued before us that the charging deeds might in substance be regarded for the purposes of succession duty as if the existing joint power had been exercised by the deceased and his son for the benefit of the latter, though it is perfectly plain that this power was not exercised. I think all your Lordships were agreed that this last argument could not prevail, since it involves the substitution of a joint power, which was not exercised, for a very different power, which was.

Your Lordships have listened to arguments on both sides on the question whether the power in fact exercised by the charging deeds ought to be regarded as a new power created by the private Act or as a power under cl. 9 of the resettlement, varied by sect. 4 of that Act. For my part, I do not think it necessary to answer this question very precisely, for the following reason. The only possible way of arriving A at the conclusion that sect. 12 (by which I mean the earlier part of it) applies in this case is to find as a matter of fair construction that the charging deeds can, in the language of LORD CRANWORTH in *Floyer's* case (2), at p. 491, " be treated as arising from the deed creating the power," with the result that the limitations or the trusts can be treated B as if they were introduced into the deed creating the power : *Braybrooke* (*Lord*) v. *A.-G.* (1), at pp. 167, 182. That could be done in both those cases. In this case, however, it is clear that it cannot be held, in the events which have happened, that the charging deeds can be introduced into the resettlement without making nonsense of the transaction. The C charging deeds created, and were intended to create, new and unconditional legal interests in George Glyn, and, coupled with the deeds of release by the deceased, these interests were made immediate. The chain of succession, if I may so describe it, is thus broken. It is not necessary to consider what the position might have been if George Glyn D had survived his father. In fact, he did not, and the £50,000 to which he became entitled was money which he took by reason of the exercise of a power conferred on him (subject to the consent of the deceased) by sect. 4 of the private Act, and in no other way. George Glyn's " succession " (within the meaning of the Succession Duty Act, 1853, E s. 2) was, therefore, conferred on him by his own act in the exercise of a power created or validated, so far as regards the events which actually happened, by sect. 4 of the private Act, and not by the resettlement. It follows that the Succession Duty Act, 1853, s. 12, applies, if at all, only as regards the last two lines of that section.

F The argument based on the construction of sect. 4 of the private Act can be dealt with shortly. It is suggested that it should be treated as if it had been so worded as to rectify or amend the power conferred by cl. 9 of the resettlement as from the date of that deed. It seems to me sufficient to say that the language of the section shows that that argument G is untenable. The section states that it shall be lawful for George Glyn " at any time after the passing of this Act with the consent," etc., to exercise the power as altered. The section cannot have a retrospective effect.

Some other points were raised in the Court of Appeal which were H not urged before your Lordships, and I shall not take up your time by referring to them, more especially as they were, in my opinion, fully dealt with in the judgment of the Court of Appeal prepared by SIR WILFRID GREENE, M.R. I should like, however, to add that I fully agree with what SIR WILFRID GREENE, M.R., said in his judgment in relation to " successions," and to *A.-G.* v. *Selborne* (*Earl*) (5). In the result, I agree with the decision of the Court of Appeal, and this appeal should be dismissed. The costs will be provided for under the terms which were imposed as a condition of leave to appeal.

Lord Russell of Killowen [read by Lord Romer]: My Lords, it appears to me to be immaterial whether the effect of sect. 4 of the private Act is to create a new power in George Glyn, or to amend the power vested in him by cl. 9 of the resettlement by striking out the proviso to that clause, and making Lord Wolverton's consent in writing a condition of its exercise. For myself, I would, notwithstanding the recital in the private Act, call it a new power framed by reference (but additional) to the resettlement power, and not an amendment of it, because there is nothing in the private Act which would invalidate a charge of £50,000 by George Glyn (without Lord Wolverton's consent in writing) contingently on his surviving his father. Such a charge would be effective if in fact he survived his father. In other words, after the private Act came into operation, there were two powers vested in George Glyn, one a power, exercisable independently of his father, to create a contingent charge, the other a power, exercisable only with his father's consent in writing, to create an indefeasible charge. If that be the true view, clearly no succession duty would be payable. Indeed, the contrary was not contended. However, even if it be assumed that the private Act created no new power, but merely amended the resettlement power, the amendment does not relate back to the date of the resettlement. A valid charge under the power could only be made by George Glyn "after the passing of this Act." No appointment made before the Act would be freed from the operation of the proviso, nor would an appointment made before the Act in terms fulfilling all the requirements of the Act be validated and be effective under the Act.

These considerations satisfy me that, while George Glyn became entitled in respect of the £50,000 to a succession under a disposition by himself as predecessor, yet no succession duty is payable. The succession cannot be said to be taken under dispositions contained in the resettlement. What conferred upon George Glyn an indefeasible title to the £50,000 was the joint operation of cl. 9 of the resettlement, the private Act, and the instruments of charge. The date, therefore, when the dispositions were made cannot be the date of the resettlement, but can only be the dates of the instruments of charge. In these circumstances, George Glyn was not, at the date of the dispositions, entitled to the property comprised in the succession expectantly on the death of his father. He was only entitled to a life interest therein. The case, therefore, does not fall within the provisions of the first part of the Succession Duty Act, 1853, s. 12, but is exempt from duty under the concluding words of that section.

A further argument was at one time advanced on behalf of the appellants—namely, that the substance of the matter should be looked at, and the case treated as one in which the £50,000 had been charged by the exercise by the father and the son of the joint general power of appointment contained in the resettlement, for, it was said, there was no need to resort to the Act except for the purpose of enabling the father to allow the money to be raised in his lifetime without incurring a forfeiture of his life interest. Therefore, so ran the argument, since everything else could have been done without the Act, the money should be treated as having, in substance, been raised under a disposition contained in the resettlement. My Lords, I have heard some strange propositions advanced, based on the "substance" theory in tax cases, but this is surely the strangest of all. An appointment made by A in pursuance of a power vested in him alone is to be treated as being "in substance" the exercise by A and B of a power vested in them jointly. The argument was, however, ultimately not persisted in, and I say no more about it. It was said, however, that the fact that £50,000 could, by apt conveyancing, have been charged under an exercise of the joint power assisted in some way in arriving at the true construction of sect. 4 of the private Act. As to that, I can only confess that (owing, no doubt, entirely to my own defects) I could not follow the argument when presented, and I do not understand it now. I agree with the judgment of the Court of Appeal, and I would dismiss this appeal.

LORD WRIGHT: My Lords, I should be content simply to express my concurrence with the judgment of the Court of Appeal delivered by SIR WILFRID GREENE, M.R., but, out of respect for the ingenious arguments which have been addressed to your Lordships on behalf of the appellant, I shall state very briefly why I arrive at the same conclusion as the Court of Appeal. The Crown in the information alleged that the charges, amounting in all to £50,000, which constituted the succession were created under the settlement of 1888 and the resettlement. The Wolverton Estate Act, 1921, was, as I read the information, treated as effective only as accelerating the succession. The claim was thus based on the first part of the Succession Duty Act, 1853, s. 12, and on the decisions of this House in ***Braybrooke's*** case (1) and *A.-G.* v. *Floyer* (2). However, this seems to me to be an untenable view. The charges themselves were, in fact, by their express terms created under the settlement of 1888, the resettlement and the private Act. It is clear, in my opinion, that, without the powers contained in sect. 4 of that Act, the charges could not have been created. Clause 9 of the resettlement contained an express term that charges to take effect after the death of Lord Wolverton, made under the powers to charge therein contained, should be subject to a condition that George Glyn should survive Lord Wolverton. Sect. 4 of the Act provided that, notwithstanding anything contained in that clause, it should be lawful for George Glyn at any time after the passing of the Act, with the consent in writing of Lord Wolverton, to exercise the power of charging conferred on him by cl. 9, so that any charge made under that power should take effect after the death of Lord Wolverton, whether or not George Glyn should survive Lord Wolverton. In my opinion, this is a new power. Strictly, the Act does not abrogate that original proviso to cl. 9, and, it may be, leaves the original power under cl. 9 unaffected, the new power being supplemental or alternative, but on any view it modifies cl. 9 in such a way as to validate the exercise of a power which, under cl. 9 of the resettlement, would have been invalid. I think that the power which it so creates is a new power. It was under that new power that the charges were created. Without it, they could not have been created. In my opinion, it cannot be held that the charges were created under the resettlement when in fact they were created in defiance of the limitations expressed in cl. 9. It follows, in my opinion, that the charges did not constitute a succession derived from the dispositions contained in the settlement of 1888 and the resettlement. The continuity of the succession was broken. A new and paramount title was created, under which George Glyn became donor to himself, as successor, in respect of the charges. That title was not contingent on his surviving Lord Wolverton, but was indefeasible on Lord Wolverton's death.

This is enough to defeat the Crown's claim without referring to the other matters dealt with in sect. 4 of the private Act, though the £50,000 could not have been raised and paid during the lifetime of Lord Wolverton (which was a matter vital to the parties) unless the restriction on Lord Wolverton's power to alienate contained in cl. 10 had been relaxed by the Act. In the recitals to the Act, the new power as to charging is described as a variation of the resettlement (" should be varied "), while the change as to Lord Wolverton's powers to alienate is described as the removal of a restriction. I do not attach any importance to the distinction. The change made by the Act, while it varies the resettlement, is so radical as to create a new power, though it may also be described as a variation of the resettlement.

It was argued that the resettlement was in law not to be deemed to be varied, but that the Act must be read retrospectively, so that the terms of sect. 4 are to be deemed to have been embodied in the resettlement. I cannot construe the Act as retrospective. Sect. 4 expresses that the new power should be exercisable at any time after the passing of the Act, and I think that the Act is clearly intended to speak as and from its date, *quoad* the variation. An Act is not to be construed as retrospective unless by reason of clear words or necessary intendment. The contention that the Act merely operated as an acceleration under the Succession Duty Act, 1853, s. 15, is seen to fail when it is observed that sect. 15 relates to cases where the succession is accelerated by the surrender or extinction of prior interests. It is, I think, clearly inapplicable to a case like this, where a new title, different in its limitations, is created. I concur in the motion proposed.

LORD ROMER: My Lords, it is plain that, if this appeal is to succeed, it must be shown that the case is governed by the decision of your Lordships' House in *Braybrooke (Lord)* v. *A.-G.* (1). The facts of that case and the points which were then decided have been summarised in the opinion of my noble and learned friend VISCOUNT MAUGHAM, which I have had the privilege of reading beforehand. From that summary, it is manifest that the present case can be brought within the decision in *Braybrooke's* case (1) only if, in executing the charging deeds, George Glynn was exercising a power of appointment created by the resettlement of Dec. 31, 1918. The charging deeds cannot otherwise be regarded as constituting part of the disposition made by the resettlement. They can only be so regarded if they fall within the principle applied in *Braybrooke (Lord)* v. *A.-G.* (1), at p. 167:

> What is done under a power of appointment is to be referred to the deed by which the power was created.

How it can be said that a power of appointment which did not exist until the passing of the Wolverton Estate Act in 1921 was created in 1888 is what I have never been able to understand. The power was given by sect. 4 of the Act in these words:

> Notwithstanding anything contained in cl. 9 of the resettlement or in the proviso at the end of that clause it shall be lawful for George Glyn at any time after the passing of this Act. . . .

Those words clearly show that a power is being conferred upon George Glyn, and a power which he did not possess before.

The only difficulty is occasioned by the fact that what the section gives George Glyn power to do after the passing of the Act is:

> . . . with the consent in writing of Lord Wolverton to exercise the power of charging conferred upon him by the said clause so that any charge made under that power shall take effect after the death of Lord Wolverton [the deceased] whether George Glyn shall survive Lord Wolverton or not.

It is nevertheless plain that, in executing the charging deeds, George Glyn cannot have been exercising the power of charging conferred upon him by the resettlement, but was exercising a larger and a different power, conferred upon him by the Act. Had the Act provided that any such appointment as is mentioned in the section should for all purposes be deemed to have been made in exercise of the power conferred upon George Glyn by the resettlement, it would have been a different matter. However, this is just what the Act has not done. It would seem that the framers of the Act preferred to create a new power altogether.

It may further be observed that the power conferred upon George Glyn by the Act was one which could only be exercised with the consent of his father, whereas no such consent was requisite in the case of an exercise of the power conferred by the resettlement. This difference might have had important consequences from the point of view of the Succession Duty Act, 1853, having regard to the construction placed upon the first part of sect. 4 of that Act by your Lordships' House in *Charlton* v. *A.-G.* (3). EARL CAIRNS, L.C., said, at p. 439, that the section appeared to point to:

> . . . a general power possessed by one person enabling him to dispose of property as an absolute owner, and not to a power given in a family settlement to a father and son where one is intended to be a check upon the other in the exercise of the power. A

In the same case, LORD SELBORNE said, at p. 446, that the first branch of the section points to:

> . . . that kind of absolute power which is practically equivalent to property, and which may reasonably be treated as property for the purpose of taxation. That is B the case with a general power exerciseable by a single person in any way which he may think fit. But it is not the case when a power cannot be exercised without the concurrence of two minds; the one donee having, and the other not having, an interest to be displaced by its exercise.

In the present case, the sums appointed under the charging deeds could in any case be brought outside the first branch of sect. 4, as it C seems to me, only if, by reason of the consent of the father being requisite to its exercise, the power could be regarded as a power not exercisable "by a single person in any way which he thinks fit," and "without the concurrence of the two minds." The power of charging £50,000 under the resettlement, however, was a general power, exercisable by George D Glyn in any way which he might think fit, and without the concurrence of two minds. Had he exercised that power and survived his father, estate duty on his father's death would have been payable on the sums appointed. Looking at the matter from the point of view of the Succession Duty Act, 1853, however, George Glyn would in that case, by virtue E of sect. 4 of the Act, have succeeded to the sums as on a succession from the donor of the power, who, according to *Braybrooke's* case (1), would have been himself. I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Bircham* F *& Co.* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re PAYNE, POPLETT AND ANOTHER *v.* ATTORNEY-GENERAL.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), **January 17, 18, 19, March 19, 1940.**]

Estate and other Death Duties—Gift inter vivos—Gift by way of settlement—Value of settled fund increased before death of deceased—Customs and Inland Revenue Act, 1881 (*c.* 12), *ss.* 38, 39—*Customs and Inland Revenue Act,* 1889 (*c.* 7), *s.* 11—*Finance Act,* 1894 (*c.* 30), *ss.* 2 (1) (*c*), 5, 7, 8 (4)—*Finance* (*1909-10*) *Act,* 1910 (*c.* 8), *s.* 59—*Administration of Justice* (*Miscellaneous Provisions*) *Act,* 1933 (*c.* 36), *s.* 3.

Estate and other Death Duties—Aggregation—Gift inter vivos—Finance Act, 1894 (*c.* 30), *s.* 2 (1) (*c*).

In Jan., 1936, the settlor, by a declaration of trust, settled £10,000 and an option to acquire shares in a company in which he was interested upon trust to hold the same for the benefit of certain members of his family. The option was exercised by the trustees of the fund, and certain investments were made by them in the exercise of the powers conferred upon them, with the result that, at the time of the settlor's death, which occurred within three years from the date of the declaration of trust, the value of the fund had greatly appreciated. The question then arose whether the "property" assessable for the payment of estate duty was the sum of £10,000 and the option, i.e., the property as it had existed at the time of the establishment of the fund, or whether it was the property as it existed at the time of the settlor's death, i.e., after the exercise of the option and the acquisition of, and the increase in value of, the investments. The second question was whether the *corpus* of the settled property was aggregable with the free estate of the settlor so as to form one estate for the purpose of determining the rate of duty :—

HELD : (i) the property assessable for estate duty was the fund in the form in which it existed at the time of the testator's death, and not as it had existed at the time of its inception, and, consequently, estate duty was payable on the increased value of the fund at the time of the deceased's death.

(ii) the *corpus* of the settled property was aggregable with the free estate of the settlor so as to form one estate for the purpose of determining the rate of duty.

Decision of SIMONDS, J. ([1939] 3 All E.R. 875) *affirmed.*

[**EDITORIAL NOTE.** The question here decided for the first time is one which has been the subject of discussion for some years. A gift *inter vivos* attracts estate duty if the donor dies within three years of the date of the gift, and the principal question arising upon that is whether the property, the subject-matter of the gift, is to be valued at the date of the gift or at the date of the death. The matter is, perhaps, carried a step further here, since there had been a change in the investment of a settled fund, and the question may be asked in this rather different form : is duty payable on the property as it existed at the date of the settlement—here the gift was by way of a voluntary settlement—or as it existed at the date of the death ? The question is answered that the material date is the date of the death, and, further, that such property must be aggregated with the free estate.

AS TO ESTATE DUTY ON GIFTS *inter vivos*, see HALSBURY, Hailsham Edn., Vol. 13, pp. 269-273, paras. 272-280 ; and FOR CASES, see DIGEST, Vol. 21, pp. 24, 25, Nos. 133-137.]

Cases referred to :

(1) *Adamson* v. *A.-G.*, [1933] A.C. 257 ; Digest Supp. ; 102 L.J.K.B. 129 ; 148 L.T. 365.

(2) *A.-G.* v. *De Préville*, [1900] 1 Q.B. 223; 21 Digest 10, *42*; 69 L.J.Q.B. 283; 81 L.T. 690.
(3) *A.-G.* v. *Gosling*, [1892] 1 Q.B. 545; 21 Digest 129, *954*; 61 L.J.Q.B. 429; 66 L.T. 284.
(4) *Tremayne* v. *Rashleigh*, [1908] 1 Ch. 681; 37 Digest 389, *32*; 77 L.J.Ch. 292; 98 L.T. 615.
(5) *Re Hodson's Settlement, Brookes* v. *A.-G.*, [1939] Ch. 343; [1939] 1 All E.R. 196; Digest Supp.; 108 L.J.Ch. 200; 160 L.T. 193. A
(6) *Strathcona (Lord)* v. *Inland Revenue Comrs.*, [1929] S.C. 800; Digest Supp.
(7) *A.-G. for Ontario* v. *National Trust Co., Ltd.*, [1931] A.C. 818; Digest Supp.; 100 L.J.P.C. 215; 145 L.T. 673.
(8) *Wiggins* v. *Watson's Trustees*, [1934] A.C. 264; Digest Supp.; 102 L.J.K.B. 464; 148 L.T. 482; 17 Tax Cas. 728. B

APPEAL by the plaintiffs from a judgment of SIMONDS, J., dated July 26, 1939, and reported [1939] 3 All E.R. 875, where the facts are fully set out. For the purposes of this appeal the facts are sufficiently stated in the judgment of SCOTT, L.J. C

Cyril King, K.C., and *Frederick Grant* for the appellants, the trustees.

J. H. Stamp for the respondent, the Attorney-General.

King, K.C.: The appellants' case is that, on the true construction of the Customs and Inland Revenue Act, 1881, s. 38, the property taken under the disposition was £10,000 in cash, and not the securities and D investments which, at the time of the death, represented what originally was £10,000. The argument that the property taken under the disposition was not £10,000, but that sum together with the powers given to the trustees to invest the fund and obtain an increment, is based upon the error of looking too much at the vehicle or means by which the E property was taken. This is the case of a gift. What was offered and taken was a sum in cash, the only difference in W. A. Payne's case being that he settled shares instead of cash. That case gives rise to a certain special consideration. The property given was the shares, and they were the subject-matter of valuation. It is quite irrelevant that the shares were F dealt with by the trustees and produced an increase. The first general proposition is that, in construing a revenue statute, there can be no implication, but the words must be looked at to see if they are such as to create a charge upon the taxpayer. *Adamson* v. *A.-G.* (1) is authority for saying that the Crown must establish that the claim comes within G the words of the statute. In *A.-G.* v. *De Préville* (2), it was pointed out by A. L. SMITH, L.J., in considering the ambit of sect. 38 of the Act of 1881, that the property had only to be brought into account if it would have had to be brought in but for the gift. *A.-G.* v. *Gosling* (3) is helpful in seeing what are the objects of sect. 38 (2) (*c*). In the present H case, there is no reservation either to M. Payne or to W. A. Payne, so that no charge arises under sect. 38 (2) (*c*). The intention has to be focussed on what was given and what was taken. There is no connection between property given away and property which, after a time, is found to represent the gift, and is in the hands of another. All the improvement in the property took place without any control by the donor, as donor, in either case. In either case, he was a trustee. The enumeration in the Customs and Inland Revenue Act, 1881, s. 39, of persons who are to account does not throw any light upon what they were to account. That is a matter to be determined by sect. 38 (2). It is contended on behalf of the Crown that the gift was not £10,000 *simpliciter*, but was that sum together with the powers and duties of the trustees. So far as that suggests that a power is property charged by the Act, it is erroneous: *Tremayne* v. *Rashleigh* (4). It has never been attempted, on behalf of the Crown, to charge the powers separately. It is sought to charge them as something wrapped up with the gift of £10,000. In the ordinary case of a settlement, no such increase in value would occur. It has happened in the present case because the settlement included a power to invest in the shares of the British Thermostat Co., Ltd. The Finance Act, 1894, s. 5 (2), is in no way a charging section, and it does not attempt to define the ambit of the charge on the occasion of the first death. There is great difficulty in distinguishing this case, on the second point, from *Re Hodson's Settlement, Brookes* v. *A.-G.* (5). [Counsel referred to *Strathcona* (*Lord*) v. *Inland Revenue Comrs.* (6) and *A.-G. for Ontario* v. *National Trust Co., Ltd.* (7).]

Grant: It is contended on behalf of the Crown that there is a difference between a gift outright and a settled gift. It therefore becomes material to consider what is the property taken within the meaning of sect. 38, and the method to be used in valuing that which is taken. As regards an outright gift of £10,000, there is no dispute that that would be the amount to be brought into account. The answer must be the same in the case of a settled gift: *A.-G.* v. *De Préville* (2). The point is, what would the donor have had if he had not made the gift? The fact that there is a settlement makes no difference. It can make no difference whether the trustees pay income to the beneficiaries or accumulate it and add it to capital.

Stamp: There is no reason for saying that, where the same disposition comes within the terms of sect. 38 (2) (*a*) and sect. 38 (2) (*c*), there is a different effect in one case from the effect there is in the other. If a power of revocation is appended to a disposition, it makes no difference to the disposition unless and until the power of revocation is exercised. If sect. 38 (2) (*c*) had been absent, and if, in the present case, there had been a power of revocation, it could not have been said that the property was not taxable under sect. 38 (2) (*a*). The general proposition that a disposition is not affected in its character until the power of revocation is exercised is the foundation of the judgment in the House of Lords in *Adamson* v. *A.-G.* (1). Apart from that proposition, that case could not have been decided in the way in which it was. If a power of revocation had been reserved to the settlor, it would have been just as much a gift *inter vivos* as in the absence of a power of revocation. *Wiggins* v. *Watson's Trustees* (8) shows that a disposition which is within the

Customs and Inland Revenue Act, 1881, s. 38 (2) (*a*), is not taken out of it by the addition of a power of revocation. If, in the present case, there had been a power of revocation reserved to M. Payne, and if it had not been exercised, the position would not be any different from what it is to-day. In order that sect. 38 can apply, something must be found which can be brought into account as at the date of the death of the donor. In the present case, we are dealing with property which has been settled by the donor within 3 years of his death. Such a disposition is capable of hall-marking property as liable to be brought into account under sect. 38. The point is, what is the property which is so hall-marked ? It has been argued for the appellants that it is the property which the donor parted with. Actually, it is the property taken under the disposition, and that was the property passing at the date of the death of the donor. *A.-G.* v. *De Préville* (2) has no bearing upon what is settled property, and, therefore, that case has no bearing upon this case. The thing which is taken must be capable of being valued at the date of the death. There must be an identifiable thing taken, and that thing must be capable of being valued. In the present case, the trust is to trustees, and they are instructed what they are to do with it. They are to make investments, and to apply the income derived from the investments for the benefit of the beneficiaries. The argument that a fund in a settlement must be regarded as one fund is supported by the Finance Act, 1894, s. 5 (2). This has been reduced in scope, but not repealed. The whole of the Succession Duty Act, 1886, implies a continuity of the settled property.

King, K.C., in reply : The argument advanced on behalf of the Crown involves the court placing upon the Customs and Finance Act, 1881, s. 38 (2) (*a*), a meaning different from that which I have asked the court to place upon it. The reason for the passing of the section was to enable the Crown to get the duty upon property which a man had parted with some little time before his death. The argument for the Crown is that it is not the *intuitus* of the section which must be looked at, but that the position must be considered as it is under a settlement. The words of sect. 38 (2) (*a*), however, enable me to say that there may be an immediate gift by a settlement just as effectively as by a gift outright. Under sect. 38 (2) (*a*), property is taken by trustees just as truly as it is taken by persons absolutely entitled. The property taken is the same thing as the property given. Sect. 38 (2) (*a*) of the Act of 1881 is not affected by the Finance Act, 1894, s. 5, which is not a charging section, and does not pretend to affect the ambit of the charge of estate duty.

Scott, L.J. : This is an appeal by trustees from a decision of Simonds, J., on an originating summons under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, taken out by them for the purpose of determining two questions as to the estate duty payable by them under the Finance Act, 1894, ss. 4 (1), 8 (4)—namely :

1. What was the property on the value of which duty became payable according

to the Finance Act, 1894, s. 2 (1) (*c*) (as amended) under a voluntary settlement made by one Matt. Payne in Jan., 1936, by way of gift, he having died on Feb. 6, 1937, within 3 years of making it ? 2. Is that property to be aggregated under sect. 4 on its value at the date of death, with the rest of the estate of the deceased settlor ?

We heard full argument, and were asked by the appellants upon the A first question to consider several decisions, but, in the result, the determining points of law are, in the opinion of all of us, dependent on the true construction of certain statutory provisions, upon which the authorities give no direct help. None the less, I cannot help agreeing with the judge that procedure by information rather than by summons B would clarify, and probably simplify, the issues better in estate duty cases where there is any degree of complication, even although the Solicitor to the Inland Revenue may assist the subject, as he did here, by writing an informal letter stating the ways in which the Board put their claims.

C I have had the advantage of reading the judgments of both my colleagues, who arrive at the same conclusion as I do—namely, that the appeal should be dismissed—though by slightly different reasoning. Where LUXMOORE, L.J., differs from CLAUSON, L.J., a little on the construction of the 1894 Act, I find myself in agreement with the former.

D I will deal first with the first question, and it will be convenient to quote on that question certain of the statutory provisions, including the Finance Act, 1894, s. 1, although the claim is under sect. 2 (1) (*c*). Sect. 1 provides as follows :

> In the case of every person dying . . . there shall . . . be levied and paid, upon the principal value . . . of all property, real or personal, settled or not E settled, which passes on the death . . . estate duty. . .

Sect. 2 (1) provides as follows :

> Property passing on the death of the deceased shall be deemed to include the property following, that is to say : . . . (*c*) property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38 . . . if those sections were herein enacted and extended F to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom . . .

The Customs and Inland Revenue Act, 1881, s. 38 (2), as subsequently amended, provides as follows :

> The personal or moveable property to be included in an account shall be property of the following description, viz. : (*a*) Any property taken . . . under a voluntary G disposition, made by any person . . . dying [after 1881] purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made [3] years before the death of the deceased. . . . (*c*) Any property passing under any past or future voluntary settlement made by any person dying . . . by deed or any other instrument not taking effect as a will . . . whereby an interest . . . is reserved . . . to the settlor, or whereby the settlor may have reserved to himself the right, H . . . to restore to himself, or to reclaim the absolute interest in such property.

The Finance Act, 1894, s. 7 (5), provides as follows :

> The principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased . . .

Sect. 22 (1) provides as follows :

> . . . unless the context otherwise requires . . . (*f*) The expression "property"

includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale . . . (*h*) The expression " settled property " means property comprised in a settlement.

The facts were stated at length by SIMONDS, J., and I accept that statement except on two small but not unimportant points, where I agree with LUXMOORE, L.J. I restate the facts only in so far as is necessary to explain the reasoning by which I reach my conclusion, agreeing in the result with that of the judge. The appellant trustees, whilst admitting liability to duty on a figure of £10,000, contend that that figure is the limit of their liability, on the ground that the settlor merely made a donation of that sum of money, the sterling value of which could not, in the absence of fresh currency legislation, change between the date of the gift and the date of the death. The figure of the Revenue's claim, on the other hand, was nearly £50,000, for their contention was that the subject-matter of the gift " taken " by the recipients (whether the trustees or the beneficiaries be regarded as the takers) was the whole settled fund, which had, in the intervening 12 months between the settlement and the death, appreciated up to that value. The judge decided in favour of the Revenue.

The deceased man, Captain M. Payne, was evidently an inventive genius with a practical sense of what inventions were likely to prove commercially fruitful. He was director and chairman of a private company called the British Thermostat Co., Ltd. He had been in the habit of giving them the free use, without payment, of his inventions. Most of them were fully protected by British and foreign patents, of which he was owner or part owner. Other of his inventions, though not yet patented, were either " accepted " or claimed and provisionally protected. To all of his patent rights I refer inclusively as the patents. His brother, W. A. Payne, who was also a director, died on May 6, 1937. In regard to him, there is a smaller claim by the Revenue, also pending on appeal before us, similar to the claim in this appeal, but in this judgment it is not necessary further to refer to it.

The company's authorised capital was 25,000 preference and 25,000 ordinary shares of £1 each. It had prospered, having over a period of 7 years ending in July, 1935, paid on its ordinary shares an average dividend of 33½ per cent., and having also accumulated a general reserve of £7,800 and undistributed profit of nearly £11,800, and having distributed £1 bonus shares to the amount of nearly £12,000. In Jan., 1936, it created another 100,000 ordinary shares of £1 each. In that month, Captain Payne was minded to make provision " as part of a family arrangement " for his parents, wife, issue, and other members of the family by settling his interests in his inventions and patent rights, and in the proceeds of sale thereof, on trusts for them, and on Jan. 29, 1936, he made a declaration by deed poll accordingly, in which he was the settlor, in the following terms. By cl. 1 he appointed himself and his brother, W. A. Payne, the first trustees and authorised the trustees (including subsequent trustees) to sell the patents, and so on, and to invest the proceeds in investments authorised by the settlement. Clause 2 contained the family provisions. There was no provision for any ultimate interest reverting to the settlor. Clause 5 was a wide investment clause. The schedules contained a long list of patents granted, accepted, and applied for. Under this deed, the beneficiaries took as a gift the benefit of the equitable right to have the trusts of the settlement executed in accordance with its terms, which included the discretionary right of the trustees not only to sell the settlor's interest in the patent and other rights and to invest the proceeds of sale but also to change the investments as they might think fit.

Effect was given to the plan of the declaration, with the assent of the company, by two deeds *inter partes*, both made after, but on the same day as, the declaration of trust. The first was between M. Payne as vendor and the British Thermostat Co., Ltd., as purchasers. Under it, the vendor sold all the patents and so on mentioned in the declaration of trust for the sum of £10,000. He also covenanted thereafter to give the purchasers the benefit of any improvements therein which he might invent. On the same day, he entered into another deed, to which his brother, W. A. Payne, was a party as well as the company. By it, he gave to his brother his "full interest" in one patent, identified in sched. (1), and such interest as he had in four other patents, particularised in sched. (2), and he and his brother then joined in selling the 5 patents to the company for the sum of £3,883 to be paid to the brother. In other respects, this second deed was similar to the first deed.

The total money consideration paid by the company to the two brothers was thus £13,883, but this was not the only consideration. That figure had been arrived at under an informal and oral agreement with the company on Jan. 22, as appears from the minutes of a meeting of directors on that day, at which the two Paynes and two other directors were present. M. Payne, speaking as chairman, there explained that he valued all the patents and inchoate rights at that figure, and the other members of the board approved his valuation. It was then resolved that, on the understanding that no claim would be made by M. Payne for the past use by the company of the patents, the company should purchase the patents and rights for that figure, paying £13,883 in cash, and giving to the two brothers as vendors an option to purchase 8,000 £1 ordinary shares in the company at 35*s.* per share. There was attached to the minute a schedule of the patents. It includes both those which a week later M. Payne assigned by the first deed and those which he and W. A. Payne together assigned by the second deed. On the same day, the sums of £10,000 and £3,883 were duly paid by cheque to M. Payne and W. A. Payne respectively, and, on the same day, the option having evidently been already exercised, certain allotments of shares were made to the two Paynes, which I will explain more fully in a moment. Also on the same day, M. Payne, pursuant to the declaration of trust, paid his

cheque into the Westminster Bank, Teddington, to the credit of the trustees' account. On Jan. 30, the trustees by cheque drawn on their trust account paid the sum of £10,000 to the company by way of subscription for 5,714 10/35 ordinary £1 shares in the company at 35*s*., in accordance with the option, and on the same day W. A. Payne paid his
£3,883 to the company, and in addition acknowledged himself to be A
indebted in a further sum of £117, making £4,000 in all, for 2,285 25/35 shares (which, with M. Payne's lot, made up the whole 8,000 covered by the option), and requested the issue of 2,000 to himself, and of the remaining 285 25/35 to the trustees, thus making for them a total of
6,000 shares, paid for at the rate of 35*s*. per share, or £14,000 in all. B
These transactions on Jan. 30 were in fact merely complementary to the allotment of the above lots of shares by the company to the trustees and W. A. Payne personally, made on the previous day in execution of the option.

An agreed memorandum contains an account of the actual doings of C
the company thereafter in relation to its share capital. In April, one bonus ordinary share of £1 was issued to the holder of each ordinary share, whereby the 6,000 £1 shares of the trustees became 12,000. On May 1, the company was converted into a public company, and the ordin-
ary shares were subdivided into 5*s*. shares, the trustees receiving in D
exchange for their 12,000 shares of £1 each 16,000 founders' shares (with extra voting rights) and 32,000 ordinary, all of 5*s*. each. Full particulars of the sales by the trustees and of their re-investments are also contained in this memorandum, but it is unnecessary to state the details.
The company continued to prosper greatly, and by Feb. 6, 1937, the E
date of the death of M. Payne, the trust investments and cash together were worth nearly £50,000.

The real—and, in my opinion, the only—issue on the first question is whether the property given by the settlor and " taken " by the donees
is in law to be regarded, as the appellants contend, as being a cheque F
for £10,000—that is to say, a gift to the trustees equivalent to that sum in cash—or, as the Revenue contend, as being the totality of the equitable interests conferred by the declaration of settlement on the beneficiaries, covering the whole value of the settled fund and entitling them to have
that fund administered as a single continuing corpus for their benefit G
in accordance with the trusts of the settlement. If the contention of the appellants is right, I agree that the value of the property on which duty would be payable would be £10,000. If the Revenue's contention is right, it is payable on the settled fund as it was at the date of the
death—that is to say, nearly £50,000. In my opinion, it is the latter. H

On the facts of this case, there can be no doubt that, in the words of the Customs and Inland Revenue Act, 1881, s. 38 (2) (*a*), as re-enacted in the Finance Act, 1894, s. 2 (1) (*c*), " personal property was taken under a voluntary disposition, made by a person so dying, purporting to operate as an immediate gift *inter vivos*, by . . . declaration of trust,"

and that the gift was not made as long as 3 years before the death, and it is indisputable that the gift did take the form of a declaration of trust, by way of settlement upon trustees for the intended beneficiaries. Even apart from the definition of "property" in the Finance Act, 1894, in my view it would be right to hold that the property so given
A was simply the totality of equitable rights created by that declaration of trust in the beneficiaries under it. The essence of those rights, looked at from that point of view, was the power conferred in equity on each beneficiary to require the trustees to administer the trust in accordance with the declaration, and also, if need be, to apply to the Chancery
B Division to enforce compliance upon the trustees. No other form or kind of property was the real subject of the gift. The transfer of the legal title to the trustees was mere machinery to effect the gift. The enjoyment of the rights of property so conferred on the beneficiaries did not enure to the trustees, and those equitable rights were *ex vi termini*,
C subject to the discretion vested by the trust in the trustees, particularly in regard to the changing of investments. If it be argued that in law the gift was to the trustees, I reply that, for the purpose of estate duty, the duties imposed and the discretionary powers entrusted must be looked at as a whole, and, so regarded, they preclude the contention of
D the appellants that it was a gift (whether to the trustees or to the beneficiaries) of a sum of money. That contention, in my opinion, assumes a gift absolute in nature and immediate in operation, and both ideas are inconsistent with the discretionary duties and powers of the declaration. As counsel for the Inland Revenue said, this was a continuing
E trust from the moment of its creation to the date of the settlor's death, and his metaphor of a river, the identity of which remains though the particles of water flow on and pass by, illustrates—if it is not pushed too far—the true nature of such a continuing trust. There never was a moment during the period of the existence of the trust when any bene-
F ficiary could point to any item of the settled fund and say: "That is mine," or to any interest to which he could lay claim except through the trustees and by calling upon them to carry out the trust in accordance with its tenor. Nor could the trustees at any time say in any true sense: "The settled fund is ours."

G An argument was addressed to us by counsel for the appellants that the £10,000 cheque was given by M. Payne after he had already agreed to the arrangement of Jan. 22 that he would sell, and the company buy, the patents for a consideration of £13,883, plus the option to apply for, and be allotted, 8,000 ordinary £1 shares at 35*s*. each, that in equity
H the patents had already passed to the company, that the declaration of trust could operate only on the proceeds of sale, and, therefore, that the subject-matter of the trust was the money, and not the patents. I think the argument fallacious, for more than one reason, but will content myself here with saying that I agree with the reasons given by LUXMOORE, L.J., in his judgment.

Much stress was laid in argument by counsel for the appellants upon the word "taken" in the Customs and Inland Revenue Act, 1881, s. 38 (2) (*a*), in contrast to the word "passing" in s. 38 (2) (*c*). I cannot follow his reasons for that distinction. The word "taken," to my mind, is merely the correlative of the word "given," just as is the word "received" in the Finance Act, 1894, s. 8 (4), and I regard the two as synonyms in these contexts. Sect. 8 (4) is the operative provision which puts the duty of accounting upon the appellant trustees, to the extent of the property received by them because "the management of it is vested in them." Sect. 8 (1) continues:

> The existing law and practice . . . subject to the provisions of this Act and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of estate duty . . .

The word "taken," therefore, either means the same thing as the word "received" or is replaced by the latter word, just as sect. 8 (4) modifies the Customs and Inland Revenue Act, 1881, s. 39, and sect. 8 (6) modifies sect. 40 of the 1881 Act, and as the Finance Act, 1894, s. 7 (5), makes the date of death the determining date for estimating the principal value of the property passing or deemed to pass, and supersedes the provision of a period of 6 months by sect. 39 of the 1881 Act, upon which CLAUSON, L.J., lays some emphasis. The trustees are made accountable just because they receive the property and have its management. Because the trustees of a settlement are made accountable for the ministerial purpose of collection and recovery of estate duty, however, it does not follow that the character of the property received by them for the purpose of the trusts of the settlement is in any way affected. It is true that the interest of the beneficiaries is equitable, whilst the trustees' rights are legal, but it is the settled fund, with its continuing, although changing, character under the investment trusts of the settlement, which constitutes the property charged with estate duty at the time when it passes or is deemed to pass. It is the trustees in office at that time who are accountable, and accountable for the property received by them (the Finance Act, 1894, s. 8 (4)). I express my view with the greatest diffidence, but I cannot entirely agree with either of my two learned but differing colleagues upon the interpretation of the 1881 Act when re-enacted in, and modified by, the Finance Act, 1894. It seems to me that the Finance Act, 1894, is directed to the nature, state and condition of the property to be valued at the date of the death, whether it be an actual passing under sect. 1 or a putative passing under sect. 2. It is a percentage of that property *tale quale* at that moment, which is cut out and kept by the revenue, and, in the case of a settled fund, it is no more possible to think of it in fact as the trustees' sole property, ignoring the beneficiaries, than it is to think of it in law as the beneficiaries' sole property, ignoring the trustees. It is a continuing corpus of property made up of various constituent parts, which, under the characteristics imparted to it by the terms of the trust, may be, and often is, continually varying. It is not questioned that the trustees in office at the time when the duty to account attaches have then the ministerial duty of accounting, with their rights over against the residue left by the revenue. It seems to me, however, that in essence what is really taxed is the beneficial ownership at that moment, A although the machinery of taxation as provided by the Finance Act, 1894, s. 8, re-enacting, subject to modification, the previous law and practice, is worked for the revenue by the existing trustees.

In my view, it does not matter what the property was, whether patents, cash, or shares, at the moment on Jan. 29, 1936, when the B declaration of trust came into operation. Whatever the property was, it instantaneously became subject to the trust, and took form as the settled fund. As such, it remained, however much, or however often, it changed its content as the trustees realised and re-invested. The colours changed, but the chameleon was still the same animal. On the C issue of aggregation, the Attorney-General is, in my opinion, right, and I adopt what SIMONDS, J., said. In the result, my colleagues and I are in agreement upon our final conclusions, and thus concur with SIMONDS, J., in both the conclusions which he reached. The appeal must be dismissed with costs.

D

CLAUSON, L.J.: The first question arising on this appeal is whether SIMONDS, J., was right in deciding that the estate duty which admittedly became payable on the death of M. Payne in respect of certain property the subject of a declaration of trust of Jan. 29, 1936, is to be calculated E upon the value at the date of his death of the assets then held by the trustees of the trust. The facts of the case are fully stated in the judge's judgment, and he also refers at length to the somewhat intricate series of sections under which the claim for duty arises. I propose to turn at once to the Customs and Inland Revenue Act, 1881, and to examine it F with a view to ascertaining what would have been its operation upon the facts of the present case if the declaration of trust had been executed soon after that Act had come into operation, and if the deceased had died within 3 months of its execution. This examination becomes necessary because the criterion for determining in respect of what property the G duty under the Finance Act, 1894, is to be calculated is whether or not, had the Act of 1881 applied, that property would be required to be included in an account delivered under that Act.

The Customs and Inland Revenue Act, 1881, dealt primarily with probate duty. Its aim was to arrange for the collection of probate duty H by the procedure of requiring an affidavit of the deceased's assets to be stamped with an *ad valorem* stamp on the value of the assets covered by the probate. Incidentally, however, a new scheme was adopted for imposing a duty of the nature of probate duty on certain personal or moveable property which had belonged to the deceased at one time, but would not be covered by the probate, and was of such a character that the legislature considered it proper that it should attract duty on much the same lines as if it had not ceased before the death of the deceased to form part of his assets. The Act enumerates in sect. 38 certain descriptions of personal or movable property, all at one time property of the deceased, and by sect. 38 and sect. 39 imposes on every person who, as beneficiary, trustee, or otherwise, acquires possession or assumes the management of property within such descriptions the duty of delivering an account verified by oath and stamped according to the value of the property included in it, the duty to arise upon such person retaining the property for his own use, or distributing or disposing thereof, or in any case within 6 calendar months of the death.

The claim on the trustees of the declaration of trust to deliver a stamped account would have been based on their having acquired possession, or assumed management, of certain property of the description specified in sect. 38 (1) (*a*)—namely, property taken under a disposition made by M. Payne purporting to operate as an immediate gift *inter vivos* by way of declaration of trust made within the specified period before the death. The account is to be stamped according to the value of the property included in it, and it is necessary to ascertain what property is to be included in it.

It is to be observed that no duty to deliver the account arises until the death of the donor, and that, even so, if the person who is to deliver the account is a trustee, he is allowed 6 months from the death for the performance of the duty, unless he distributes or disposes of the property before the expiration of that period of 6 months. It would seem clear that it is contemplated that the property is property which he may possibly be in a position to distribute or dispose of after—but within 6 months after—the death. *Prima facie*, it would not seem likely that the legislature would impose upon a trustee, who has in his hands property of which he is a trustee which he may be in a position to distribute or dispose of, a duty to deliver an account, verified on oath, of any property other than that in his hands. This consideration is reinforced when it appears that he has to expend on stamp duty a sum calculated with reference to the value of that property, an expenditure against which it is obviously contemplated that he should be indemnified out of that property. The property to be included in the account must, however, satisfy the qualification that it is property taken under a disposition made by the donor. In the case where the trustee who is called upon to deliver the account is (as in the case now being dealt with) a trustee on a continuing trust created by a disposition made by the dead man, it seems to me, I must confess, reasonably clear that his duty is to insert in his sworn and stamped account particulars of the property which, at the date of the donor's death, is in his hands as property held on the trusts of the disposition made by the donor—property, I may add, which is saved from having to be inserted in the executors' probate affidavit merely by the circumstance that the trustee holds it, not for the donor, but upon the trusts marked out by the donor's disposition. It is objected that this cannot be right, because, so it is said, the property to be inserted in the account must be property of which it can be predicated that it was taken under a disposition made by the donor. In other words, it is said that the word "taken" in sect. 38 (2) (*a*) must be taken as meaning, and as meaning only, taken by the original disponee. The word "taken," in reference to property which *ex hypothesi* is being particularised by the trustee in whose sworn account, delivered at or within 6 months after the death, it has to be included, must, in my view, be construed, not as meaning "taken by the original disponee," but as meaning "in the hands of" the trustee at the material date by virtue of the original disposition of the donor. This is a perfectly possible meaning, and, if it is accepted, the whole scheme of the operation of the Act of 1881 in regard to a trust created by the donor, and continuing as an operative trust at his death, becomes clear and logical. A possible question might be raised as to whether the property to be included in the account should be the trust property as it stood at the donor's death or as it stood at the date (that is to say, 6 months after the death, or, in some circumstances, sooner after the death) at which the duty to deliver the account became absolute and enforceable. However, as in the present case there is no suggestion that the property comprised in the trusts of M. Payne's declaration of trust varied within the 6 months after his death, this refinement need not be pursued.

These considerations appear to me to lead to the conclusion that the property which, in circumstances corresponding to those of the present case (there being no distribution or disposition within 6 months of the death), would have had to be included in the necessary account under sect. 38 of the Act of 1881 would be the property which was, at the date of M. Payne's death, comprised in the declaration of trust. It follows that that is the property which, under the Finance Act, 1894, s. 2, must be deemed to pass on his death. Accordingly, I reach the conclusion that the property which is, under the Finance Act, 1894, to be deemed to pass on M. Payne's death is the property which at M. Payne's death was comprised in the settlement, no variation in that property having taken place between the date of M. Payne's death and the date when the trustees would (had the Act of 1881 applied) have had to bring in the account. The value of that property will, by reason of the Finance Act, 1894, s. 7 (5), have to be ascertained as at the date when it is to be deemed to pass—namely, at the date of M. Payne's death. Accordingly, the order made by SIMONDS, J., appears to me to be correct. If I am right in thus holding that the property which attracts duty is that which, at the date of M. Payne's death, was the subject-matter of the trusts of his declaration of trust, it becomes unnecessary to examine what the property was which was initially comprised in those trusts, and I accordingly refrain from discussing that matter.

The only remaining point relates to the question of aggregation. I do not propose to say more on this point than that I am satisfied that the judge's decision is correct, for the reasons given by him, and I am prepared to adopt his reasoning as my own. In my judgment, the appeal should be dismissed, with the usual result as to costs.

Luxmoore, L.J.: By an order, dated July 26, 1939, Simonds, J., declared that estate duty became payable on the death of one M. Payne in respect of the property the subject of a gift made by him through the medium of a declaration of trust, dated Jan. 29, 1936, to which I will hereafter refer as the declaration. The judge further declared that the principal value upon which the estate duty is payable is an amount equal to $\frac{20}{21}$ of the value at the date of M. Payne's death of the assets then subject to the declaration, and that the property at the value so ascertained is to be aggregated with the estate of M. Payne for the purpose of ascertaining the rate at which the duty is to be computed.

The order was made on an originating summons issued under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, by the present trustees of the declaration as plaintiffs against His Majesty's Attorney-General as defendant. The reason why the duty is limited to $\frac{20}{21}$ of the assets is that certain additional property was made subject to the declaration on the day following its execution by a further disposition made by one W. A. Payne, a brother of M. Payne. It is agreed that this additional property was, at the date on which it was made subject to the declaration, of a value equal to $\frac{1}{21}$ of the property settled by M. Payne. It is common ground that both M. Payne and his brother, W. A. Payne, died within the period of 3 years from the date of the declaration, and it is admitted that estate duty became payable in respect of the respective dispositions by M. Payne and W. A. Payne, but the contest between the present trustees of the declaration and the Inland Revenue authorities is with regard to the value in each case to be attributed to property the subject of those dispositions, and also to the question of aggregation. A separate originating summons was taken out by the present trustees in respect of the property of which W. A. Payne disposed. It is unnecessary to state any of the facts with regard to the last-mentioned summons, because, although both cases were heard together in the court below, it was agreed in this court that in some circumstances different considerations might be applicable to the disposition made by W. A. Payne, and that the more convenient course would be for the second summons to stand over until after this court had given judgment in M. Payne's case.

As I have already stated, the present trustees admitted before Simonds, J., that estate duty became payable in respect of the disposition made by M. Payne. They also contended, both here and in the court below, first, that such duty must be calculated on the sum of £10,000 only on the basis that the property taken under the disposition was a sum in cash to that amount, and that, as the property settled was cash, its value must remain unaltered at the death of M. Payne, and, secondly, that there is no ground for aggregating that sum with the rest of M. Payne's estate for the purpose of ascertaining the rate of duty applicable.

On the other hand, it was contended on behalf of the Attorney-General, both in the court below and in this court, first, that the value of the property on which the duty is to be calculated is the market value of $\frac{20}{21}$ of the respective investments and moneys which were in the hands of the trustees of the declaration on Feb. 6, 1937, the date when M. Payne died, and, secondly, that to ascertain the appropriate rate at which the duty is to be calculated the value of M. Payne's estate must be aggregated with the $\frac{20}{21}$ of the value of the respective investments and moneys. SIMONDS, J., declined to accept the contentions of the trustees, and accepted those put forward on behalf of His Majesty's Attorney-General. The trustees have appealed from the decision of SIMONDS, J.

There is no dispute of fact, but, although the material facts are stated by SIMONDS, J., it is, I think, necessary to repeat some of them in order that this judgment may be intelligible. In Jan., 1936, M. Payne was the sole registered proprietor of a number of patents, and was the joint registered proprietor with his brother, W. A. Payne, of other patents. He was at the same time a director of, and had a large interest in, the British Thermostat Co., Ltd., hereinafter referred to as the company. In the same month, an agreement was made between the company and M. Payne and his brother for the purchase of all the patents for the sum of £13,883 in cash, with an option to acquire 8,000 ordinary shares in the company at 35*s.* per share. This agreement is recorded in the minute of a meeting of the directors of the company on Jan. 22, 1936. On Jan. 29, 1936, M. Payne executed the declaration. On the same day, in part fulfilment of the agreement already made, the settlor, in consideration of the sum of £10,000 then paid to him by the company, assigned to the company the patents—or, as the case might be, his share and interest in the patents—referred to in the schedules to the assignment. It appears that the sum of £10,000 was in fact paid by the company to the settlor on the same day by a cheque drawn in his favour, which he then paid into an account opened with the Westminster Bank in the names of himself and his brother as trustees of the declaration. In the assignment, nothing was said about the option to take shares in the company, but there is no doubt but that this option was in fact part of the consideration for the transfer of patents or patent rights, and that it became exercisable by the trustees and W. A. Payne respectively, in the proportion which £10,000 bore to £3,883. The company on the same day, as appears from the minute of the meeting of its directors of that date, allotted to M. Payne and his brother, W. A. Payne, the trustees of the declaration, the shares of the company which were the subject of the option. It would appear, therefore, that the option had already been exercised by the trustees when the allotment was made, and that the judge was in error in stating that it was exercised on Jan. 30, 1936, although the £10,000 was not paid to the company in satisfaction of the price of 5,714 $\frac{10}{35}$ of those shares until the later date. The capital of the company was from time to time increased, and from time to time bonus shares were issued to the shareholders, including the trustees of the declaration, in respect of their respective holdings. The details are immaterial. In May, 1936, the company was converted into a public company. It was exceedingly prosperous, with the result that the shares, which had been subdivided into shares of 5*s.* each, were quoted at a high figure on the Stock Exchange. Of this fact the trustees took some advantage, realising some of the shares before the settlor's death, at which date the trust funds consisted of 15,000 ordinary 5*s.* shares and 16,000 founders' 5*s.* shares of the company, £911 8*s.* advanced on mortgage, 500 £1 shares in De Haviland Aircraft Co., Ltd., 65 £5 shares in Legal and General Assurance Co., Ltd., stock to the value of £100 in the British Electric Traction Co., Ltd., 500 shares of £1 each in the Assurance and Finance Trust, Ltd., £2,500 2½ per cent. funding loan, and £7,405 11*s.* in cash. It is on the value of these funds at M. Payne's death that the claim to duty is made.

To determine the questions raised on the appeal, it is necessary to consider the material sections of the Acts under which the duty is claimed, and its amount is to be ascertained. The duty is claimed under the Finance Act, 1894, s. 2 (1), which, so far as applicable to the present case, provides as follows:

> Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (*c*) Property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, if those sections were herein enacted and extended to real property as well as personal property and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom . . .

The Customs and Inland Revenue Act, 1881, s. 38, as amended, so far as it is applicable to the present case, provides as follows

> (2) The personal . . . property to be included in an account shall be property of the following descriptions, viz., (*a*) any property taken . . . under a voluntary disposition made by any person so dying [after Feb. 1, 1894] purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made 12 months [now 3 years] before the death of the deceased.

The Finance Act, 1894, s. 7 (5), provides that, for the purposes of estate duty:

> The principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased . . .

The first question seems to be what is the meaning in the Customs and Inland Revenue Act, 1881, s. 38 (*a*), of the phrase "property taken." The section appears to me to direct attention, in the case of a declaration

of trust, to the declaration itself, for it is by that document that the disposition of property has been made. It is to be observed that no reference is made to the beneficial interests created under the declaration of trust, nor is any distinction made between the interests of the trustees, if there is an appointment of trustees, and the interests of the bene-
A ficiaries. CLAUSON, L.J., whose judgment I have had the opportunity of reading, has come to a conclusion that the meaning of the phrase "property taken" must be ascertained by considering it in the light of the provisions in the 1881 Act, especially sect. 39, which defines how and by whom the appropriate accounts for probate duty are to be delivered
B under that Act. In the result, he attributes to the phrase a meaning which admittedly is not the *prima facie* meaning of the words used. With all respect to his judgment, I see no sufficient ground for departing from that *prima facie* meaning, especially having regard to the fact that the Finance Act, 1894, s. 2 (1) (*c*), provides that sect. 38
C of the Act of 1881, as amended by sect. 11 of the Act of 1889, is to be considered as if it was "herein enacted."

In my judgment, it is necessary to consider the actual words of the declaration. It contains recitals which set out M. Payne's interests in a large number of inventions, and the letters patent and provisional
D protection relating thereto respectively, and refers to a schedule in which the inventions or patents are specifically identified. For convenience, I will refer to these hereafter as the patents and patent rights. These recitals are followed by one in which is recorded M. Payne's desire to make provision for his parents, wife and issue, and other members of his
E family, by settling "my estate share or interest" in the inventions, patents and patent rights "and in the proceeds of sale thereof and of declaring in respect thereof" certain trusts. The last-mentioned recital is followed by a declaration in these terms:

> I do hereby irrevocably declare that I and the trustees hereof to be appointed
> F as hereinafter provided shall hold my estate share or interest in the said inventions and letters patents *brevet d'invention* and the other foreign patents and patent rights and in the proceeds of sale thereof and the investments and securities which may from time to time by virtue of the provisions hereinafter contained for varying investments represent the same and any cash derived from or representing any part thereof from time to time awaiting investment (all hereafter collectively referred to as the trust fund) [upon certain trusts].

G The essential point to notice is that the matters described as subject to the declaration are (*a*) "the patents and patent rights," (*b*) the proceeds of sale thereof, (*c*) the investments and securities from time to time representing the same, and (*d*) any cash derived from, or representing, any part thereof from time to time awaiting investment. All these items
H are described as being collectively referred to as the trust fund. It is the fact that, at the time when the declaration of trust was executed, M. Payne had entered into an agreement with the company to sell to it the patents and patent rights the subject of the declaration for the sum of £10,000 and an option to acquire ordinary shares of the company at 35*s*. per share. Notwithstanding this agreement, however, the pro-

perty described in the declaration was the patents and patent rights and the proceeds of sale thereof, and there is no mention of the sum of £10,000. It must, I think, in the absence of evidence to the contrary, be assumed that the declaration was the first document executed on Jan. 29, 1936, for the actual form of the documents is contrary to any other assumption. On the same day, M. Payne assigned to the company A by a separate deed bearing the same date the patents and patent rights, and received in payment therefor a cheque for £10,000 drawn by the company in his favour.

In his judgment, SIMONDS, J., says, ([1939] Ch. at p. 873; [1939] 3 All E.R., at p. 879): B

> It is at least clear what the settlor settled. He had, before executing the declaration of trust, agreed to sell the patents and patent rights the subject of that declaration, and on the footing that the agreement was carried out, as in fact it was, he could and did settle nothing more than the sale price which the company had agreed to pay him, that is to say, the sum of £10,000 with an option to acquire ordinary shares of the company at 35*s.* a share. C

I do not myself appreciate why the actual words of the declaration of trust should be departed from. It is plain that, from the moment the declaration was executed, the trustees thereof had an interest in the patents and patent rights, subject, of course, to the existing agreement for sale, so that, if, by any chance, no matter how remote, the assignment D to the company had not been executed, it would have been impossible to say that the patents and patent rights were not the property taken under the disposition. The actual form of the document by which the disposition is effected seems to me to be material to the consideration of the question, and, with all respect to the judge, I can see no justification E for departing from the description of the property which is contained in the declaration itself. If one has regard to the fact that the agreement for sale of the patents and patent rights must be treated as having been implemented after the execution of the declaration, that which was received by the trustees of the declaration was not £10,000 in cash, but F was £10,000, being the proceeds of sale of the patents and patent rights settled, and it was, I think, clearly identified as such. No one reading the declaration by itself could have any doubt but that the property taken under the declaration of trust was the patents and patent rights. The fact that, at the moment of execution of the declaration, the patents G and patent rights were subject to an agreement for sale, but had not been assigned to the company, is in accord with the actual form of the declaration.

Apart from the description in the declaration, "property" is defined by the Finance Act, 1894, s. 22, as including: H

> . . . real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale . . .

In my judgment, the property taken under the declaration is the patents and patent rights, and this conclusion is sufficient to dispose of the first question, and to answer it in the same way as it was answered by Simonds, J., for it is admitted that, if the property taken is the patents and patent rights, estate duty is exigible on the value at the death of M. Payne of the various items which now represent that property and the proceeds of sale thereof and the investments for the time being representing the same, and consequently estate duty is payable on that value.

The main foundation of the argument that estate duty could not be exigible on any sum in excess of £10,000 was the submission that the property taken under the declaration was £10,000 in cash, although that sum is nowhere mentioned in the declaration. Both in the court below and in this court, counsel for the respondent accepted the proposition that the declaration was a settlement of £10,000, but he sought to differentiate between a gift of £10,000 in cash and a gift of that sum to trustees to invest and hold on behalf of other persons for divers beneficial interests. It may be that there is such a distinction, but the argument appeared to me necessarily to involve the consequence that the words " property taken " in the Customs and Inland Revenue Act, 1888, s. 38 (1) (*c*), must be construed as if they were " the property taken by the beneficiaries," for it was contended that the " property taken " was not £10,000, but was an equivalent sum which must be invested in accordance with the directions for that purpose contained in the declaration. In other words, it was argued that the direction to invest was an integral attribute of the property taken, which could not be separated from it, and for this reason differentiated it from £10,000 in cash. I find it difficult to accept this contention, for it seems to me to ignore the position of the trustees, and to consider only that of the beneficiaries, whereas, so far as the property taken is concerned, the fact that the trustees are given the legal interest cannot be divorced from the provisions in the declaration defining the beneficial interests. In my judgment, in considering what is the meaning of the phrase " property taken," it is necessary to consider, not only the equitable interests of the beneficiaries, but also the legal interests of the trustees, and, consequently, the property taken is that which is transferred to the trustees.

Having regard to the conclusion at which I have arrived—namely, that the property taken under the declaration was the patents and patent rights—I do not think that it is really necessary to consider what consequences might have resulted if the property disposed of had been described in the declaration simply as a sum of £10,000, and I refrain from so doing. I think it right, however, to point out that there is no greater justification for contending that the subject-matter of the declaration is £10,000 in cash than there is for contending that it is the shares in the company actually paid for out of that sum, for, as already stated, it appears from the minutes of the meeting of the directors of the company—at which both M. Payne and W. A. Payne were present, held on Jan. 29, 1936, being the same day on which M. Payne assigned the patents and patent rights to the company and received the cheque for £10,000—that the shares the subject-matter of the option, which also formed part of the purchase price for the patents and patent rights, were allotted by the company to the trustees of the declaration, and that on the day following—namely, Jan. 30, 1936—the £10,000 was repaid to the company in payment of the shares so allotted. Whether the property taken under the declaration be, as therein expressed, the patents and patent rights in question, or in substance the shares allotted to the trustees in performance of the arrangements between the company and M. Payne and his brother, the same result follows, for what was subject to the declaration at M. Payne's death represented either the proceeds of sale of the patents and patent rights or the proceeds of sale of the shares originally taken by the trustees in the exercise of the option. Although I have arrived at the same conclusion as that expressed by Simonds, J., by a different route, I agree with the answer which he gave to the first question.

The only other question which remains is whether or not the value so to be ascertained is to be aggregated with M. Payne's estate for the purpose of ascertaining the appropriate rate at which the duty exigible is to be calculated. It is sufficient to say that I find myself in complete agreement with the judgment of Simonds, J., and the reasons there stated, and that I do not desire to add anything to it. I think it right to state that during the argument a number of questions were canvassed on each side to establish that many anomalous results might arise in considering the method of valuing property the subject-matter of an absolute gift. I realise the difficulty in finding a satisfactory answer which provides a uniform, or even a logical, solution for all cases, but, as they do not, in my judgment, arise in the consideration of this case, I have refrained from dealing with them. In the result, I agree that this appeal fails, and should be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re CAPON, TRUSTEE IN BANKRUPTCY *v.* KNIGHT (R.C.) & SONS.

Re CAPON, TRUSTEE IN BANKRUPTCY *v.* WOODWARD & WOODWARD.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), **January 25, 26, 29, 30, 31, March 19, 1940.]**

Sale of Goods—Transfer of property—Ascertained goods—Purchase price provided by auctioneers—Bankruptcy of purchaser—Whether property in goods in purchaser or in auctioneers—Sale of Goods Act, 1893 (*c.* 71), *s.* 17 (1).

Both the appellants were auctioneers, and from time to time each of them had given credit to a farmer whereby the latter was enabled to acquire pigs at their respective auctions. In each case, the farmer, before removing the pigs to his farm, signed notes acknowledging that the pigs were the property of the appellants and that they could be removed and sold by them at any time. In the usual course of business, such pigs were later resold by the auctioneers, the farmer receiving the profit on the whole transaction less auctioneer's commission. If the pigs were resold through any other agency, the auctioneers received interest on the purchase money at the rate of 5 per cent. per annum. On Feb. 23, 1938, the farmer executed a deed of assignment, and in Mar., 1938, was made bankrupt. On Feb. 23, 1938, the appellants entered the farm, seized the pigs and re-sold them. The respondent, the farmer's trustee in bankruptcy, claimed the proceeds of sale of the pigs, on the ground that the arrangements made between the appellants and the farmer were ineffectual attempts to obtain security for the money advanced to the farmer, while the appellants contended that the farmer had bought the pigs as their agent, and that at all material times the pigs were their property:—

HELD: the property in the pigs had passed from the vendor to the farmer, and the subsequent seizure and sale of the pigs by the appellants were wrongful. The trustee in bankruptcy was, therefore, entitled to the proceeds of sale of the pigs seized.

Decision of FARWELL *and* MORTON, JJ. ([1939] 4 All E.R. 554) *affirmed.*

[EDITORIAL NOTE. The Sale of Goods Act, 1893, s. 17 (1), provides that, on a sale, the property is transferred to the buyer at such time as the parties intend. That refers to the parties to the contract of sale, and, if there is an ascertained buyer, an auctioneer would not be a party to the contract. Upon this ground, it is held that the pigs passed to the farmer, and not to the auctioneer. This, in its turn, in the present case depends upon a finding of fact that the farmer was not an agent of the auctioneers when he was bidding at the auction.

AS TO TRANSFER OF PROPERTY IN SPECIFIC GOODS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 83, 84, paras. 97-99; and FOR CASES, see DIGEST, Vol. 39, pp. 501, 502, Nos. 1187-1205.]

Cases referred to:

(1) *Re James, Ex p. Swansea Mercantile Bank, Ltd.* (1907), 24 T.L.R. 15; 5 Digest 805, *6877.*

(2) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 529, 572; 12 Digest 483, *3961.*

(3) *McEntire* v. *Crossley Brothers, Ltd.*, [1895] A.C. 457; 3 Digest 94, *249*; 64 L.J.P.C. 129; 72 L.T. 731.

(4) *Coldman* v. *Hill*, [1919] 1 K.B. 443; Digest Supp.; 88 L.J.K.B. 491; 120 L.T. 412.

Appeal by two firms of auctioneers, respondents to the motions, from an order of the Divisional Court (Farwell and Morton, JJ.), dated Nov. 20, 1939, and reported [1939] 4 All E.R. 554. The facts are fully set out in the judgment of Scott, L.J.

D. N. Pritt, K.C., and *A. S. Orr* for the appellants. A

C. E. Harman, K.C., and *C. L. Henderson* for the respondent.

Pritt, K.C.: The arrangement between the auctioneers and the bankrupt was, in essence, a contract of agistment. The pigs were bailed in order that they might be fattened for reward. At the time the pigs were knocked down to the bankrupt, it looked like a sale to him, but B he was really buying as the agent of the auctioneers. Capon was not to have the property in the pigs until he had paid for them. The whole transactions were transactions in which, in the ordinary course, Capon identified every pig which he sent back to be re-marketed, and paid the appropriate price in respect of it. The custom is general in the case C of sales by auction around Stowmarket. The case for the trustee is that the agistment note is an attempt to create a colourable security over goods sold. One is compelled to recognise, however, that two firms of auctioneers, acting independently, have taken the same course. There is no evidence that the property in the pigs ever passed to Capon, D and, therefore, the agistment note cannot be a bill of sale. Unless the court comes to the conclusion that the property in the pigs passed to Capon, no attack on this document under the Bills of Sale Acts can succeed. The proper inference to draw from the evidence is that Capon was bidding as the auctioneers' agent, and that all he bought was the E auctioneers' property, which was passed to him on the terms of the agistment note. There was a contract of agistment on the terms that Capon should have the difference between the price at which the pigs were bought and the price at which they were afterwards sold. [Counsel referred to *McEntire* v. *Crossley Brothers, Ltd.* (3) and *Re James, Ex p.* F *Swansea Mercantile Bank, Ltd.* (1).]

Harman, K.C.: The agistment note might be a perfectly good document if it were registered as a bill of sale. It was a licence to seize. It was an attempt to do by an unregistered instrument not in the proper form that which can only be done by an instrument in the proper form G and registered under the Bills of Sale Acts. There is no single document to support the theory of agency at all. Capon says in his affidavit that he was never appointed, and never regarded himself as, an agent. When he was cross-examined in the county court, he stated that nothing had been said to him about being an agent, and that nothing had been said H to him about buying the pigs as agent for the auctioneers. The indications are against agency and in favour of ownership. The auctioneers realised that, if they wanted Capon's custom, they must finance him. They wanted security for the credit given. They took security in a way which the law does not allow. The agistment notes are not so called on their face. They do not purport to transfer the property in the pigs. They assume that the auctioneers already have the property in the pigs, and are really an attempt to finance the transactions, and an attempt to give the auctioneers security for the amount of the purchase price. [Counsel referred to *Coldman* v. *Hill* (4). He was stopped A by the court.]

Pritt, K.C., in reply: The crucial question is: in whom is the property in the pigs? That question can be determined against the auctioneers, unless the view is taken that Capon was buying as their agent. All parties were agreed, however, that Capon should not have unsecured B credit.

SCOTT, L.J.: This is an appeal from an order of a Divisional Court, consisting of FARWELL and MORTON, JJ., whereby they allowed the appeal of the trustee in bankruptcy of one Harry Urban Capon from an C order of His Honour JUDGE HILDESLEY, K.C., sitting in bankruptcy in the Ipswich County Court. The appellants before us are two firms of agricultural auctioneers, R. C. Knight & Sons and Woodward & Woodward, who hold regular weekly or fortnightly auctions of stock at Stowmarket in Suffolk. I will refer to the firms as Knights and D Woodwards, respectively, and to the respective senior partners who gave evidence in the county court as Knight and Woodward. The bankrupt, whom I will call Capon, was a farmer, and on the morning of Feb. 23, 1938 (the day before the commencement of the bankruptcy), there were in his possession 679 pigs in course of fattening, mostly on a farm called E Kenton Hall, but some on an adjoining farm, both of which he owned and occupied. I shall refer to Kenton Hall as including both. The pigs had all been knocked down to him as bidder by one or other of the appellants at their auctions. At 10.30 a.m. on Feb. 24, Capon executed a deed of arrangement. That was the act of bankruptcy to which the F trustee's title related back. Partly on Feb. 23, but mostly on Feb. 24 after 10.30 a.m., the appellants forcibly, and against the will of Capon, removed all the pigs, and subsequently sold them by auction. This they did on a claim that the pigs belonged to one or other of them, without distinguishing between the two firms, for they made no attempt G to allocate the pigs according to their alleged ownership, doubtless because they had no means of identification. The proceeds of sale were £4,408 2*s*. 3*d*., but the appellants claimed to deduct insurance, carriage and other expenses and commission, amounting to £27 19*s*., leaving the sum of £4,380 3*s*. 3*d*. From this sum they deducted £4,151 4*s*. as owing H by Capon to them for advances made by them in respect of the original auction—prices fetched, not by the 679 pigs, but by 999 pigs, that is, 320 more than the number still on the farm when they seized. The surplus of £228 19*s*. 3*d*. they admitted was the property of the trustee. Their "realisation account" is a most instructive document, if considered in the light of the true facts, and of the affidavits which I analyse later. I regard the case as important, and its facts as illuminating in connection with the public problem of short-term agricultural credit, although the question for our decision is, in the final analysis, quite simple.

The trustee took proceedings in the bankruptcy in Ipswich County Court by two motions, subsequently consolidated, challenging the right of the auctioneers to remove the pigs, primarily on the ground that, till the moment of the act of bankruptcy, the pigs were the property of the bankrupt, and, in effect, on the ground that the auctioneers had wrongfully converted them. The county court judge decided against the trustee, holding that the property was not in Capon, but was in the auctioneers. The trustee appealed to the Divisional Court. That court seems to have assumed that the County Courts Act, 1934, s. 105, applies even to an appeal from a county court sitting in bankruptcy, so as to bar any appeal except on law, but none the less it held that the judge's inferences from the facts were erroneous in law, and it reversed him. The assumption was mistaken A county court sitting in bankruptcy exercises the same jurisdiction as the High Court (sect. 103 of the Bankruptcy Act, 1914), and, under sect. 108 of the same Act, an appeal from either is a rehearing, the Divisional Court being at liberty to review the county court judge's findings of fact. This position is preserved by the County Courts Act, 1934, s. 192 (5). The appeal to the Court of Appeal in bankruptcy is also a re-hearing, but the judgment there is final, there being no appeal to the House of Lords. From the decision of the Divisional Court the auctioneers appeal to us.

What started the business was that Capon wanted to buy pigs for fattening, but could not buy unless he could get credit for the whole price till such time as he could re-sell the pigs as fattened pigs. Up to a point, the auctioneers' version of the facts fits in with the evidence of Capon's need of credit. It discloses a system of dealing by which, whatever the parties called it, Capon did in fact obtain delivery without payment, on an indefinite credit, of all the pigs knocked down to him at each auction. Under it, Woodwards or Knights as auctioneers out of their own pocket paid to their principal, the undisclosed vendor, the whole purchase price of each lot sold, less commission, and agreed with Capon not to ask him to reimburse them till after the re-sale of the pigs by him two to four months later, when, in the normal case, the pigs, having been fattened, would fetch 50 per cent. to 100 per cent. more than they had cost at the original auction. However, the way in which they sought to establish their property in the pigs was by alleging an oral agreement made by Woodwards with Capon before the first deal, by which Woodwards employed him to bid secretly on their behalf and as their agent, so that the property in the pigs would pass to them automatically at the auction on the fall of the hammer, and then remain in them, and never pass out of them to him until the moment when he finally re-sold the pigs, whether by auction through them or by private

sale without their knowledge. However, as, during the period that they were to have the property in the pigs, it was equally necessary for him to have possession, a plausible pretext for separating their supposed ownership from his actual possession had to be invented. This they found in the well-known agricultural custom of agistment, under
A which stock belonging to A is delivered to B to be agisted by him on his farm. That is to say, it is there to be fed and cared for by him. Very possibly they were aware of the legal point that agisted stock on a farm is safe from the reputed ownership doctrine of the Bankruptcy Act: *Re James, Ex p. Swansea Mercantile Bank, Ltd.* (1). If so, they may
B well have regarded the use of the word "agistment" as a happy thought. However, whatever they had in their mind, the word "agistment" could not help them unless they really were the owners of the pigs, and so their case at the trial wholly depended on their proving that an oral agreement had been made by Woodwards with Capon, before the first transaction
C took place, that Capon should bid not for himself, but for them as their agent, and similarly by Knights before their first transaction. Counsel for the appellant auctioneers did faintly argue an alternative contention that, even if Capon did not buy as agent for them, he must be considered to have re-sold to them after each auction, but there was not a shadow
D of evidence to support such a contention.

The substantial question in the case is thus whether this whole alleged system had any reality at all, or whether it was a sham, or, in other words, whether there was any truth in the auctioneers' story that Capon was buying, not for himself, but as their agent, in order to enable them
E as owners really to bail the pigs to him on agistment—or what they called agistment, for it was different from ordinary true agistment.

The general story of the case is told in considerable detail in the judgment of the county court judge, but I disagree with many of his findings and inferences, so it is necessary to re-state the facts as they appear to
F me. I have the less hesitation in differing from him, first, in that he discredited the evidence of Knight, the first witness called in support of the auctioneers' version of the story, and, secondly, because the contemporaneous books of account support the trustee's case.

The bankrupt had earlier in his career been a farmer in a large way of
G business in different parts of Suffolk, but in 1927 his financial position forced him to execute a deed of assignment for the benefit of creditors, with liabilities of £67,000. An arrangement was then made, however, and he escaped bankruptcy. In Dec., 1934, he occupied Kenton Hall, a fairly large farm, and certain other farms in Suffolk. In that month,
H he started to obtain pigs at auction sales conducted by Woodwards as auctioneers. In Jan., 1935, he started similarly with Knights. In substance, the course of business with each firm was the same, and there was not much difference in their oral evidence. It was common ground that Capon's commercial object was to fatten the pigs on his farm for a period of 6 weeks to 8 weeks, or, as he said, sometimes as long as

4 months, and then to sell them again at higher prices as fattened pigs. His profit was to come out of the difference between the cost of acquisition and the proceeds of final realisation after allowing for all intermediate expenses—namely, expenses of feeding with purchased feeding stuffs (which are essential for fattening), tending, transporting to and from market, and so on, including also all losses by sickness, accident, and the like, for it was also common ground that he took all risks, and the auctioneers none. Unfortunately, he was financially weak, being short of both cash and credit. Indeed, he could not buy at all unless he could get credit from the moment the hammer fell right up to the time when the pigs would finally be sold. He was able, apparently, to get ordinary unsecured credit from his sellers of feeding stuffs as long as his public credit remained unshaken, but no doubt he realised that the registration of an 1882 bill of sale would have been fatal to such credit, and probably that even a charge given by him to his bank on the pigs, with or without other farming stock, under the Agricultural Credits Act, 1928, and registered at the Land Registry, as required by that Act, would have been no less fatal.

He began by bidding at an auction held by Woodwards on Dec. 14, 1934. Various pens of pigs were knocked down to him. He was not asked to make any payment, but he was given a sold note, and his name was thereupon entered in the firm's journal as purchaser in exactly the same way, and on the same page of the book, as the names of others who were admittedly purchasers in their own right. His ledger account in their books was posted in just the same way as those of other purchasers. On the day of the sale, Woodwards sent their own cheque for the price less their commission to the undisclosed principal, the vendor of the pigs he had bought. The pigs so sold remained in Woodwards' possession until removed, usually the next day, by Capon, who, like other purchasers, produced his sale note to the man in charge as his delivery order.

Woodwards' story in the county court was that, although they were employed as auctioneers by undisclosed principals to sell at auction, and although Capon bid in the ordinary way and got the lots knocked down to him, and although they knew he could not buy except on credit, and were content to pay their own principals forthwith the full selling price less commission, and so be out of their money, and have to wait for payment of it until the time came when the pigs should be re-sold by Capon as fattened pigs, none the less they did not give him credit at all, that before the first transaction he had already agreed with them to bid as their agent so as to pass the property in the pigs to them on the fall of the hammer, and that they then bailed their own pigs to him on a contract of agistment for reward, his "reward" to be such profit, if any, as he could make on the ultimate re-sale, after defraying all expenses, and after taking all risks of death or accident or illness to the pigs. Woodwards called it agistment, and Knights followed suit, although at common law the agister takes none of those risks, but is liable for negligence only.

To establish this story, Woodward relied almost entirely on three documents—namely, (i) a letter from himself to Capon, dated Dec. 18, 1934, four days after the auction where Capon first bid, (ii) a "receipt" for the pigs, which he enclosed for signature, calling it an "agistment note," and (iii) Capon's reply of Dec. 21. The actual first "receipt" was not produced in court, but one dated Aug. 27, 1937, prepared by Woodwards and signed by Capon, with a 6*d*. stamp imprinted, was produced, and was said to be in identical form with that of Dec. 21, 1934, except for figure and date. The one of 1934, therefore, no doubt ran as follows:

> Received of Messrs. Woodward & Woodward 45 pigs costing £164 19*s*. which I agree to feed and see after for Messrs. Woodward & Woodward. I acknowledge that the pigs are their property and may be removed and sold by them at any time.

The first letter from Woodward to Capon, dated Dec. 18, 1934, was as follows:

> Dear Harry, I now enclose you an agist note in respect of the 43 pigs you purchased on Thursday last for £160 7*s*. You will no doubt appreciate I particularly want to keep this business on a business footing and immediately these pigs are sold, you to pay us for them. So far as I am concerned, I do not want to handicap you in making the best price possible of the pigs when you re-sell them. Of course naturally we should like to have them come to our sale, but if you decide to sell them at home, you to pay us 5 per cent. on the money and to remit the cash at once. I think that for the pigs we sell in the yard, we should be allowed the usual commission of 6*d*. in the £. I should also like to know if you propose to keep our pigs separate and not to mix them with other pigs. I shall be glad to hear from you that you agree to these terms and that you think they are reasonable.

To that Capon replied as follows on Dec. 21, 1934:

> Dear Gordon, Thank you for your letter. I quite agree with your agist agreement and consider it quite reasonable. I have no doubt most of the pigs will come back to your sale and doubtless you will sell more pigs for me than come out of your sale: the private bought pigs I shall expect a slight reduction in the commission. Your pigs will be kept separate almost invariably; when mixed I will let you know. The present ones are in long yard at Blood Hall. Any alteration in the number I will acquaint you.

Before considering these three documents, it is desirable to say a few words about the proceedings in the county court. The consolidated motions were heard together, and the issues in each were the same, but the case against Knights was presented first in evidence. The material before the county court judge was an affidavit in each case by the bankrupt, an affidavit by each auctioneer, the transcript of a prior examination in bankruptcy of each auctioneer, and, finally, the oral evidence of Capon, Knight and Woodward. There is nothing in Capon's two affidavits to support the auctioneers' allegation of an antecedent agreement with him to act as their agent in bidding. On the contrary, he contradicts it flatly. The nearest he gets to an admission that the pigs were not his property is the single sentence:

> Whilst they were in my possession they were to be regarded as belonging to [the auctioneer] and agisted by me.

It was common ground that he was to be free to sell the pigs as and when he thought fit, and that he was not required to pay their purchase price until he did sell, and, further, that, if he sold the pigs otherwise than through the auctioneer through whom he had bought, he was to pay interest at 5 per cent. per annum for the period between his purchase at their auction and the re-sale elsewhere. If they were re-sold through the auctioneers, they were to deduct their full commission. He admitted that he was to bear all risks. Finally, he conceded that he was supposed to keep the pigs acquired through one auctioneer separate from those acquired through the other, and also from pigs acquired by himself elsewhere. He said, however, that such separation was not practicable, and he did not think that "either auctioneer could have picked out his own pigs." This last point has an important bearing on the main issue of fact. I can see no evidence that there was any effective segregation of any sort, much less any attempt to keep individual lots purchased permanently distinct, so as to enable him or the auctioneers to know the "provenance" of the pigs when re-sold by him, either at their subsequent auctions or elsewhere. The fact is that he kept a current account of pigs as mere units of account, like pounds sterling, treating pigs sold as being those represented by the oldest credit, and applying the criterion of maturity for sale as a modification of the rule in *Clayton's Case* (2). I can see no possibility of any such identification of pigs sold with pigs bought as would enable either him, or *a fortiori* the auctioneers, to keep a record of what pigs in his possession were the property of which auctioneer, or of Capon in the case of pigs bought by him elsewhere. Nor, indeed, was there any system or any attempt on the part of either party to preserve any continuing identity of pigs bought with pigs sold. It was no doubt contemplated at the outset of the course of business that the pigs would as a rule be sent back for re-sale to the auctioneer through whom Capon had bought them, but he was in fact left free to sell by private treaty if he chose, and there was no arrangement for the particular firm to be notified, or for their leave to be required, if he wanted to sell otherwise than through them. His unfettered freedom, and the absence of any method of identification, made the practical observance of any such system impossible, although quite probably the expectation of the auctioneers that they would as a rule get the auctioning of a number of pigs comparable to his purchases operated in their minds as a commercial justification for granting him credit.

I now return to the only documentary evidence there was which gave the least support to the auctioneers' story—namely, the original three Woodward documents, which I have already read. The agistment note was primarily a bailee's receipt for the 43 pigs, costing £160 7*s*. The cost price was obviously irrelevant to an ordinary agistment contract, but, if the reality of the transaction was a purchase by Capon and an advance by Woodward at his request of the purchase price to the

vendor, the record of its amount would be natural enough. Otherwise, the first three lines do contain the main terms of an ordinary contract of agistment, except that the reward to the agister is omitted. The auctioneers swore that Capon's reward was to be his profit on the re-sale of the particular pigs bought, after deducting all expenditure on those
A pigs up to re-sale, but in saying this they ignored altogether the business risks, very real on the average, of (i) death, (ii) illness, (iii) accident, and (iv) interference with marketing caused by swine fever in the neighbourhood. Yet all of these risks were, on their story, separated from ownership and put upon him, as the agister, with consequences, as the
B event showed, disastrous to his average profit on the totality of transactions. Nor did they have regard to those pigs which, in accordance with the alleged contract, he might sell elsewhere, with little or no profit, or even at a loss on the average—a very important factor, as, in the absence of any system of identification, he could not know, when he
C sold, what he had paid for any individual pig.

The last two lines of the " receipt "—" I acknowledge that the pigs are their property and may be removed and sold by them at any time "—would be mere surplusage in the common agistment contract, in which redelivery on demand is the owner's right. However, such right of
D removal and sale at any time and without notice is definitely inconsistent with even their own evidence of the terms of the contract, which was that Capon was to have an unqualified right to keep the pigs until he regarded them as ripe for resale. That right was essential to his opportunity of earning the profit which they said was his agreed reward.
E On the other hand, if he was, and the auctioneers were not, the owner of the pigs, and if the agistment note was meant to operate as a licence to seize given to them by him as owner, and conferring on them a right which would prevail against his unsecured creditors, they may well have thought it effective. They were not lawyers, and apparently
F never took legal advice as to the validity of their plan as a whole. Capon also may have been willing, in his dire need of credit, to sign the receipt, without realising that his " regarding the pigs as their property," as he said in his affidavit, was wholly ineffectual to give them any right to seize. Alternatively, he may not have cared whether it was valid
G or not, as long as he got his pigs on credit. He was no doubt ready to do almost anything in order to avoid the fatal damage to his credit which would have resulted from the publicity of any registered document. It was stated in evidence in the county court that the " receipt " had been shown to counsel and passed by him as an effective note of
H an agistment contract. If it was so shown, we may safely assume that counsel was simply asked the one question, and was not told anything of the facts of the case. It is clear from the receipt that, whilst it assumes the property to be in the auctioneer, it contains no such hint as to how it got there as might have put counsel on his guard. That and several other essential terms of the alleged bargain are absent from

the receipt. Incomplete references to certain of them appear in the two letters between Woodwards and Capon in Dec., 1934, but, in the main, the appellants were obliged to rely on their oral evidence about them, although in his evidence Woodward seemed really to regard the receipt almost as a document conferring title upon him, and to attach little importance to any oral bargain. A

It is difficult to imagine, if such a course of dealing had been really agreed, that a written contract would not have been drawn up. The unreality of such agreement is further shown by Woodward's letter of Dec. 18, which is in certain respects quite inconsistent with it. It speaks of " the pigs you purchased," and of the price of " the pigs when you B resell them." It assumes complete liberty in Capon to sell " at home "— that is, not to auction them publicly, through Woodwards—and calls for interest, in that case, on the money originally advanced. It also assumes a right in Capon not to keep Woodwards' pigs separate, for it asks what he " proposes." The reply of Dec 21 is entirely consistent C with this criticism, for it puts pigs which he calls " private bought " in the same category as those purchased by him at Woodwards' auction. It also assumes his right to " mix," but adds a voluntary promise to notify a change of number.

In Knights' case, there was always a similar " receipt " or agistment D note, but no letters were exchanged just after their first dealing. Otherwise, their evidence was similar to Woodward's, though Knight was called first. The only real attempt by the auctioneers to answer the trustee's case against them was their evidence that it was a notorious custom for agricultural auctioneers to buy through dummy bidders for E themselves, the dummies being farmers, and then to give possession to the farmers on so-called agistment terms. It was not necessary, they said, to inform their principals, either beforehand or when sending the cheque for the price realised less commission, and they had not done so in the present case. Knight in evidence said that he did not tell the F vendors because they knew it, but no vendor was called to say so in the witness-box. Woodward also said that he did not tell the vendors. On this point, counsel for the auctioneers conceded frankly that such a contract of sale by the vendors through the dummy bidder to themselves would have been voidable, but relied on the fact that it was not avoided G as sufficient for his appeal. Knight also asserted in the county court that the practice of his buying for himself and agisting the pigs to the farmer was well-known to the feeding-stuff merchants, who gave the farmer credit (unsecured) for the feeding-stuffs required. This evidence, however, hardly harmonises with para. 7 of his own affidavit, in which, H narrating the interview which he and Woodward had with Capon on Feb. 22, 1938, the day before they began their removal of the 679 pigs, he swore that :

> Capon's only allusion to his creditors which I can recollect was an intimation that the removal of the pigs would cause his creditors for feed supplied to require

> immediate payment, and thereby put him in financial difficulties, but I am unable to recollect the precise words he used.

That remark of Capon's shows, incidentally, how his credit would have collapsed if the merchants had supposed for a moment that the ostensible ownership of the pigs on his farm was not real.

In the county court, Woodward said that "the agistment note was the bargain," as in his examination in Capon's bankruptcy he had said that the agistment note and the two letters "set out the whole transaction," but he would not depart from the view stated in his affidavit that by arrangement with him the bankrupt had bid as his firm's agent. In my view, however, Capon's admitted freedom to do what he chose with his pigs, without any notice to the auctioneers who professed to own them, is one of the fundamental inconsistencies in their story, and shows it to be false. For instance, when swine fever was in the district, towards the end of 1936 and early in 1937, Capon sold 400 pigs to his co-operative society, the Eastern Counties Farmers' Trading Society, for immediate slaughter at a low price, but Woodward in the witness-box said that he did "not know till yesterday that a large number went to 'the Eastern Counties.'"

The auctioneers' books were, in my opinion, the most conclusive evidence against the alleged agreement. Woodwards' books of account treated Capon's purchases as being purchases for himself, and there is no entry at variance with this vital feature. Indeed, there is not a shred of evidence in those books to indicate anything but a normal purchase, and it was not disputed that all the sales by Capon, whether by private treaty or by auction through either of the appellants, were sales by him, though how they imagined that the property got divested out of them and into Capon did not appear. It is to be remembered, moreover, that they did not even know of his private sales till after the event. Buying notes at the start, and selling notes when he sold by auction, were duly rendered to him, as to every other buyer or seller. In Knights' case only is there any entry or method of book-keeping which even appears to throw doubt on Capon's ownership from start to finish. Towards the end of 1935, that firm thought fit to start a special book, subsequently labelled by their auditors the "agistment ledger," for so-called "agistment" transactions, the letters "A/L." being prefixed in the journal to items to be posted from it to the agistment ledger. However, the inference which we were invited by the appellants to draw from Knights' change in their book-keeping—namely, that the ownership was really in them—did not appeal to us. In the first place, the fact that an "agistment note" was always signed by Capon, coupled with Knights' belief that it conferred some protection on them as creditors, sufficiently accounts for the late adoption of the "agistment" book-keeping practice. In the second place, from such material as we had, it seemed to us that Woodwards' books, and also Knights' books, as a whole definitely controverted the inference, and pointed to a true purchase by Capon. We accordingly had the original books of both firms produced to us in court, and Knights' books were very candidly explained to us by their bookkeeper.

It was agreed by counsel for the respective parties that the following information appearing from the books produced and the explanations given to us by the bookkeeper should be treated as being properly in evidence before this court. (1) Interest was paid by the bankrupt on the original purchase price bid by him for pigs at auctions held by Knights where such pigs were subsequently resold by the bankrupt elsewhere than at auctions held by Knights, and such interest was calculated at the rate of 5 per cent. per annum for the period during which the original price was in fact outstanding. (2) Knights kept a loose-leaf ledger containing debtor-and-creditor accounts relating to purchases and sales at their auctions in the form appropriate to credit transactions between themselves and their customers, and also a book called an agistment ledger which was kept on precisely the same lines as was the loose-leaf ledger, except that the word "agist," instead of the word "bought," was used in it to describe the transactions under which the bankrupt obtained pigs from Knights' auction sales. There were other persons who bought at auctions held by Knights under arrangements similar to those existing between the bankrupt and Knights. (3) Although the so-called agistment arrangement started in Jan., 1935, no account for the bankrupt was opened in Knights' agistment ledger until Nov. 28, 1935.

On the evidence as a whole, the only possible conclusion at which I can arrive is as follows. Capon wanted credit. Indeed, he could not carry on without it. Woodward knew his shaky position, but wanted his custom in order to augment the regular attendance of farmers at his auctions, for his firm lived out of commissions on sales. He was fearful of giving purely personal credit, and wanted to get some kind of security if he could, but he realised that Capon's public credit would be badly weakened if it became known that his stock was not his own, and would certainly collapse if, in order to obtain credit, he gave any charge which had to be registered, and that this would be the end of Capon as a supporter of his market. The agistment device occurred to Woodward. Perhaps he had tried it before, for there was no evidence as to when he first used it. He drafted his "agistment note" in the form of a receipt, asked his question of some counsel, got an encouraging answer about the form, and guessed that Capon would sign it if asked. Therefore, he enclosed it in his letter of Dec. 18, 1934, in which he discreetly referred to the pigs as "purchased" by Capon. He was an old friend, having helped Capon to escape bankruptcy in 1927, and it may well be that his friendship made him a little careless of the realities of what he was doing.

Knight came along a few weeks later, availed himself of the start made by Woodward, with whom he was evidently intimate, and copied

him. As I have said, it was only 10 months later that Knight thought of giving the system verisimilitude by opening a special ledger. It may be that both of them supposed that the property in the pigs had somehow passed to them, or it may be that one or both of them realised that the scheme was—what shall I call it ?—a try-on. Fortunately, this
A court need not decide which it was, but I cannot help regarding the whole system as an improper device to get the better of unsecured creditors whilst avoiding the publicity of registration, as would have resulted if Capon had given a documentary charge to the auctioneers under the Bills of Sale Act, 1882, or to his bank, under the Agricultural
B Credits Act, 1928. That the two auctioneers should have made Capon sign a document which was to remain secret until wanted, saying that the pigs belonged to them, shows how dangerous these irregular methods of credit may become. That livestock assets of £4,400, ostensibly belonging to a farmer who is receiving large supplies of feeding-stuffs on
C his personal credit—a credit created by their very presence on the farm after being purchased by him at public auction—should in reality belong to the auctioneers would be a monstrous injustice to the merchants and to others who gave him credit, and yet that is the position which the appellants sought—albeit ineffectively—to bring about. It is of
D the very essence of any healthy system of agricultural credit that suppliers should know, or be able to ascertain, where they stand in regard to a farmer's ostensible assets, and that is the policy of the 1928 Act. Fortunately, the evil attempt made in the present case has failed.

E There is a further aspect of public importance. These two firms of auctioneers, if judged by what they attempted to prove, would seem to have been wholly oblivious of the duties of an agent in three respects. An agent employed to sell may not buy for himself, nor may he put himself in a position where his own interest even *may* conflict with his
F principal's interest, whether or not it in fact does so. Had these agents really intended to buy their principal's pigs, they would have been acting in breach of both duties. They contended that it was not incumbent on them to inform the vendor, their principal, of what they were doing, because it was so common a practice that he must have known of it,
G and must have been a consenting party. I am satisfied that their own story that Capon was bidding for them is untrue. However, if it had been true, they would certainly, in spite of any conceivable practice, have been under a duty to make the fullest disclosure to their principal. This is the third respect in which they stand convicted on their own
H evidence of a total disregard of their legal duty. However, I do not for a moment accept the story of any such practice—still less of a trade custom—of auctioneers as they gave in evidence. If they really meant to swear to a widespread practice that stock knocked down at auction, instead of being purchased and paid for by the bidder (or the third party for whom he is bidding), is secretly purchased by the auctioneer

through the bidder as his agent, so that it becomes the property of the auctioneer, I do not believe their evidence. It was denied by Capon, and their own books belie it. Indeed, their failure to make any disclosure to the vendor and the complete absence from their minds of any idea that there was anything calling for disclosure in my opinion show that there was no reality in their story of the prevalence of the tortuous practice of a sort of secured credit such as that by which they were trying to forestall Capon's unsecured creditors. Such a practice would mean, of course, that the auctioneer employed to sell does not sell at all, but simply retains his principal's stock, whilst pretending that he has duly sold it, and that the cheque he sends is the price paid by the independent purchaser to whom it was knocked down.

Nevertheless, it is not possible wholly to disregard the applicants' evidence that some kind of general practice does obtain, the more so as Knights' agistment ledger and journal do show that they were giving credit to many other farmers besides Capon. There is nothing to justify an inference that secured credit was given, but the evidence does point to the frequency of an unsecured personal credit being given by auctioneers to farmers. Until 1928, there was no legislative attempt to set up in England any public system of short-term agricultural credit. The need had not been recognised by Parliament. All through the nineteenth century, before the amalgamation of the innumerable local private banks into a few large almost semi-public concerns with branches all over the country, the local banker knew personally all the farmers of his district, and their relations, and the family history and financial expectations of his customers, and knew when he could take the risk of giving purely personal credit. However, as the private banks became amalgamated into the "Big Five" of the present day, the personal touch disappeared, or became less effective. In place of the former banking assistance, there grew up, as is well known, a wide-spread practice of agricultural merchants providing personal credit, especially for seeds, fertilisers and feeding-stuffs, and I do not doubt that the practice of auctioneers giving credit to farmers buying stock grew up in the same way. To do so would involve no breach of agent's duty, as the loan of money to pay the purchase price would not concern the vendor. The auctioneer's duty would have been discharged.

I have no doubt that that was the real transaction on each occasion in the present case, nor do I doubt that the practice is common in England, and that to this extent the auctioneers were speaking the truth. Had they tried to find a witness, as they boasted they could, to prove their fantastic story of a custom for auctioneers to put up farmers as dummies to bid on their behalf, they would have failed, and that, I have no doubt, is why they did not try. We need not decide whether the auctioneers knew that the property was in Capon, and not in them, or whether they really thought that it had somehow passed to them, for their misconception would not matter. The property was always in Capon. The story of his buying for them was untrue, and the agistment note was, in that sense, a sham.

I have discussed the facts at length for two reasons. First, a careful analysis of the evidence was necessary, in order to draw the right inferences. In the second place, the subject of short-term agricultural credit is one of great importance to the agricultural industry, and both the evidence given by the auctioneers and the true facts of the case help to throw light on the needs, the difficulties and the dangers connected with that subject. The manufacturer, through an acceptance with or without documents attached at so many months, directly or indirectly gets that length of credit for his purchase of raw materials. "Feeding-pigs," or other store stock, are the farmer's raw material, which he converts into his finished product. The use of the bill of exchange has not been found practicable in agriculture, and some other credit method is needed. It is common knowledge that this is largely provided by merchants, and, it may well be, also by auctioneers, and, if the rates are reasonable, a useful service is rendered to farmers. Such credit, however, has its drawback. It tends to commit the farmer to the one channel of sale, and thereby to limit his market freedom. To do them justice, the auctioneers in the present case, if their improper attempt to obtain security be put on one side, did not unfairly hamper Capon's market freedom, but the very fact that their story was so plausible as to persuade of its truth so good a judge as His Honour Judge Hildesley, K.C., shows how dangerous such irregular methods of credit may be in their reactions upon unsecured creditors. I notice in Capon's bankruptcy file, which was produced to us, that even the Eastern Counties Farmers' Trading Society, a well-known agricultural co-operative society, with an established reputation for good management, is a creditor for a large sum. I am glad to think that they will now get their *pro rata* share of the pig money. It would be of general service to the agricultural community if the Minister of Agriculture could publish a full return annually of the working of the Agricultural Credits Act, 1928. The appeal must be dismissed with costs.

Clauson, L.J.: At the hearing of this appeal, counsel for the appellants failed to satisfy me that the result reached by the Divisional Court was otherwise than correct. The full analyses of the facts contained in the judgments of Scott and Luxmoore, L.JJ., enforce and justify this conclusion, and make it unnecessary for me to add more. I accordingly concur in the dismissal of this appeal with costs.

Luxmoore, L.J.: This appeal occupied a considerable period of judicial time, and a large number of questions were raised in this court and in the courts below, but, when the material documents and the relevant evidence given at various stages of the proceedings in the county court, and the arguments of counsel in this court, are considered, the questions to be determined appear to fall within a small compass.

The original proceedings were started in the Ipswich County Court on Feb. 21, 1939, by the trustee in bankruptcy of one Harry Urban Capon (to whom I will refer as the bankrupt) by two separate motions, one against a firm of auctioneers who at all material times carried on business at Stowmarket under the style of R. C. Knight & Sons, and the other against a firm who also carried on a like business at Stowmarket under the style of Woodward & Woodward. The two motions were subsequently consolidated, and were heard together by his Honour Judge Hildesley, K.C., who decided in favour of the auctioneers, and dismissed the motions with costs. The claim made by the trustee in bankruptcy was that the proceeds of sale of 679 pigs taken by the auctioneers from farms occupied by the bankrupt a few weeks before the adjudication, and without his consent, should be repaid to the trustee in bankruptcy. The trustee in bankruptcy appealed to the Divisional Court, where the appeal was allowed. The auctioneers now appeal to this court from the decision of the Divisional Court, and ask that the order of the county court judge may be restored. The fundamental question to be determined is whether the property in the 679 pigs so sold was in the bankrupt or in the auctioneers.

It is necessary to state the material facts, and to bear in mind that in bankruptcy proceedings the findings of the county court judge are open to review in the Divisional Court, or in this court when exercising its jurisdiction in bankruptcy, for in all bankruptcy proceedings, wherever commenced, any appeal is by way of rehearing: see the Bankruptcy Acts, 1914 to 1926, s. 108, and the Bankruptcy Rules, 1915, rr. 3, 134, as amended, and R.S.C., Ord. 48, r. 1, incorporated in the Bankruptcy Rules, 1915, r. 134. In this respect, the position is different from that with regard to findings of fact by a county court judge when exercising his ordinary jurisdiction. I only refer to this because of the statement made by Farwell, J., at the beginning of his judgment.

The material facts are as follows. The bankrupt was a farmer, occupying, and carrying on his business at, several farms in Suffolk, in the neighbourhood of Stowmarket. He had carried on that business over a long period with varying success, or want of success. He had in fact executed an assignment for the benefit of his creditors in 1927, when his liabilities amounted to about £67,000. A member of the firm of Woodward & Woodward was the trustee of this deed. In Dec., 1934, the bankrupt was anxious to deal in pigs, and for this purpose he desired to buy pigs in the local markets, and, after fattening the pigs on one or other of his farms, to resell them at the best price obtainable. He had little or no ready money. Accordingly, he approached Woodward & Woodward in Dec., 1934. As the result of his conversations with Gordon Woodward, a member of this firm, it was arranged that the bankrupt should bid for pigs at any of the periodical auction sales held by Woodward & Woodward at Stowmarket. If the pigs were knocked down to the bankrupt, the firm agreed to pay the vendor the price at which the pigs were knocked down, the pigs being taken by the bankrupt to one or other of his farms and fattened by him. When the pigs were fattened, they were to be resold. If Woodward & Woodward acted as the auctioneers on the resale, they were to be entitled to a commission of 2½ per cent. on the resale price, and the bankrupt was to repay to them the original price paid for the pigs at the first auction. If the resale was effected through any other auctioneer or agent, the bankrupt was to repay to Woodward & Woodward the price paid for the pigs at the first auction, together with interest on that sum calculated at the rate of 5 per cent. per annum from the date when the original sale price was paid by Woodward & Woodward to the original vendor down to the date of repayment. When the pigs bought at an auction sale were delivered to the bankrupt, he was sent a bought note showing the number of pigs bought and the price paid for them, and, in accordance with an arrangement made between Woodward & Woodward and the bankrupt, the latter signed a receipt in a form prepared by Woodward & Woodward. The following is a typical example of the receipt given by the bankrupt:

> Received of Messrs. Woodward & Woodward, auctioneers, Station Road, Stowmarket, 36 feeding pigs costing £134 4*s.*, which I agree to feed and see after for the said Woodward & Woodward. I acknowledge the pigs are their property and may be removed and sold by them at any time.

The receipt was signed by the bankrupt. The substance of this arrangement is set out in two letters, the one, dated Dec. 18, 1934, from Gordon Woodward to the bankrupt, and the other, dated Dec. 21, 1934, from the bankrupt to Gordon Woodward. The first letter, omitting formal parts, is as follows:

> I now enclose you an agist note in respect of the 43 pigs you purchased on Thursday last for £160 7*s.* You will no doubt appreciate I particularly want to keep this business on a business footing and immediately these pigs are sold, you to pay us for them. So far as I am concerned, I do not want to handicap you in making the best price possible of the pigs when you re-sell them. Of course naturally we should like to have them come to our sale, but if you decide to sell them at home, you to pay us 5 per cent. on the money and to remit the cash at once. I think that for the pigs we sell in the yard, we should be allowed the usual commission of 6*d.* in the £. I should also like to know if you propose to keep our pigs separate and not to mix them with other pigs. I shall be glad to hear from you that you agree to these terms and that you think they are reasonable.

The second letter, also omitting formal parts, is as follows:

> Thank you for your letter. I quite agree with your agist agreement and consider it quite reasonable. I have no doubt most of the pigs will come back to your sale, and doubtless you will sell more pigs for me than come out of your sale: the private bought pigs I shall expect a slight reduction in the commission. Your pigs will be kept separate almost invariably; when mixed I will let you know. The present ones are in long yard at Blood Hall. Any alteration in the number I will acquaint you.

In the books of account of Woodward & Woodward, some of which were produced to the Court of Appeal, the transactions between that firm and the bankrupt are entered on both the debit and the credit sides in exactly the same manner as one would expect transactions between a person buying goods on credit and paying for them from time to time would be entered, the only difference being that, when an entry is made on the debit side of the account in respect of pigs bought, the number of pigs included in each purchase is stated in the margin. When the pigs were bought under the arrangement a bought note in the form usually given to purchasers at auction sales was sent by Woodward & Woodward to the bankrupt, and, when any of the pigs fattened by the bankrupt were resold by auction by Woodward & Woodward, a sold note in the form usually given to vendors was sent by that firm to the bankrupt. On every resale, the whole of the money produced at that sale was paid over to the bankrupt, who thereupon sent to Woodward & Woodward a cheque for the original purchase price of a specified number of pigs, although on occasions a number of pigs in excess of the specified number was sold at the particular auction.

Arrangements similar to those above stated were made between R. C. Knight & Sons and the bankrupt, but dealings in pigs thereunder did not start until Jan., 1935. A number of books kept by R. C. Knight & Sons were shown to us, and we had the advantage of an explanation by their bookkeeper of the books so produced. It was agreed by counsel for the respective parties that the information appearing from the books produced and the explanations given to us by the bookkeeper should be treated as being properly in evidence before this court. I need not restate what the result of the information and explanations were, as they have already been stated in full by Scott, L.J.

Both Woodward & Woodward and R. C. Knight & Sons sought in the affidavits filed on their behalf and in the oral evidence adduced in the county court to establish that the bankrupt purchased all pigs bought at auctions held by either of them as agent for the firm which held the auction, but this was denied by the bankrupt in his affidavits in reply, and also in his evidence before the county court judge. It was argued that, if the bankrupt was the agent for the auctioneers, respectively, then the property in any pigs bought by him in that capacity passed to the auctioneers for whom the bankrupt was acting, on payment to the vendors for the particular pigs. I am prepared to accept this argument for the purposes of this case, although it is, I think, material to point out that, if the auctioneers, without the knowledge of the vendors, became the purchasers of pigs offered for sale by them, any vendor would be entitled to challenge the transaction and have the purchases so made set aside.

This argument was not dealt with expressly by the county court judge, although, as pointed out by the Divisional Court, his judgment can only be founded on the assumption that such agency existed, for there is no other explanation to support the view that the property in pigs knocked down to bids made by the bankrupt passed to the auctioneers. The auctioneers respectively allege that such an agency existed. The bankrupt denies its existence. The only safe guide, in the circumstances, is to ascertain what in fact happened when pigs were knocked down to the bankrupt. It is common ground that the

only interest which the auctioneers had in pigs so dealt with was either a commission at the rate of 2½ per cent. on such of them as were resold by the auctioneers at auction sales held by them, or, if the pigs were resold through any other agency, a sum calculated at the rate of 5 per cent. per annum. These facts are certainly far more consistent with a purchase by
A the bankrupt for his own benefit than with a purchase by him as agent for the auctioneers. However, the matter does not end here. It is common ground that, after pigs were knocked down to the bankrupt, they were at his risk, and not at the risk of the auctioneers. Moreover, the auctioneers had no voice in fixing the price to be bid by the bankrupt,
B nor in the selection of the particular pigs to be bought. The bought and sold notes are inconsistent with the auctioneers' contention, and, with the sole exception of the reference in the books of Knight & Sons to agistment transactions, the relevant entries in the books of both Woodward & Woodward and Knight & Sons are more consistent with
C the view that the bankrupt was the purchaser than with the view that he was acting as agent for the auctioneers. The only circumstance in support of the contrary view is the form of the receipt given by the bankrupt when he took delivery of pigs bought at auctions held by the auctioneers. It is said that these receipts are evidence of the existence
D of an agreement between the auctioneers and the bankrupt for the agistment of pigs. The features of an agistment agreement are well known. The essentials are, first, that the animals to be agisted are the property of the person delivering them to the farmer, and remain that person's property. The farmer's obligation is to feed the animals
E and deliver them up to the owner on demand, but the animals are not at his risk. He is only liable for injury arising from negligence or neglect of reasonable and proper care of the animals. All the farmer gets out of the agreement is the agreed remuneration for feeding the animals. On the submission made on behalf of the auctioneers, they
F are under no liability to pay for the feeding of the pigs. They run no risk of loss if any of them die owing to causes for which the bankrupt is not responsible, and, once the pigs have been delivered to the bankrupt, they have no further financial interest in them, provided that the original purchase price is paid, except to receive a commission if they resell
G any of them at auctions held by themselves at the same rate as they obtained from the original vendors—namely, 2½ per cent. on the sale price, or (and this is perhaps the most significant feature of the transaction) interest at the rate of 5 per cent. per annum on the original purchase price paid for the pigs for the period between the date when
H the original purchase price was found by the auctioneers and its repayment to them by the bankrupt. In my judgment, it is improper to describe the arrangements between the auctioneers and the bankrupt as constituting agistment agreements.

The material documents and the facts proved in this case lead to only one conclusion, and that is that the bankrupt, when bidding for pigs at auctions held by the auctioneers, was acting, not as their agent, but for himself, and that he became the purchaser of such pigs as were knocked down to him. On this aspect of the case, there can be no room for doubt but that the property in pigs purchased passed to the bankrupt under the Sale of Goods Act, 1893, s. 17. This being so, the so-called agistment agreement was inoperative to pass any property in the pigs A in question from the bankrupt to the auctioneers, and, in so far as it purports to confer on the auctioneers a right to seize the pigs, is void, because it is admittedly in contravention of the provisions of the Bills of Sale Act, 1882.

The auctioneers entered on the bankrupt's farm on Feb. 23 and Feb. 24, B and removed therefrom 679 pigs without the bankrupt's consent. These pigs were sold by the auctioneers for the sum of £4,408 2*s.* 3*d.* The auctioneers retained out of this sum the sum of £4,179 3*s.*, and paid to the trustee in bankruptcy the sum of £228 19*s.* 3*d.*, being the amount by which the total net proceeds of sale exceeded the total amount due C to the auctioneers for the moneys advanced for the purchase of pigs and the cost of removal of the pigs to the place of sale. The Divisional Court was, in my judgment, right in discharging the order of the county court judge and ordering the auctioneers to repay to the trustee in bankruptcy the proceeds of sale, after deducting the sum of £228 19*s.* 3*d.*, D which had been already paid to him. The appeal fails, and must, therefore, be dismissed. The appellants must pay the costs of this appeal.

Appeal dismissed with costs.

Solicitors: *Field, Roscoe & Co.*, agents for *Gotelee & Goldsmith*, Ipswich (for the appellants); *Herbert Smith*, agent for *Westhorp, Cobbold & Ward*, Ipswich (for the respondent). E

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

MEE *v.* TOONE.

[KING'S BENCH DIVISION (Hawke, Charles and Macnaghten, JJ.), **March 18, 1940.**]

A *Emergency Legislation—Billeting—Billeting notice on householder—Complaint lodged against notice but not heard at time of hearing before justices—Refusal to comply with billeting notice—Whether billeting notice operative before complaint determined by tribunal—Defence (General) Regulations,* 1939 (*S.R. & O.*, 1939, *No.* 927), *reg.* 22 (1), (8), (9).

On Nov. 1, 1939, the respondent, whose husband was the driver of a school omnibus, was served by a properly constituted billeting officer with a billeting notice requiring her to furnish board and lodging for B two children. The two children, who were present at the time of the service of the notice on the respondent, were then in quarantine after having suffered from diphtheria. The respondent refused to furnish the board and lodging required, and on Nov. 3 she lodged a complaint against the billeting notice with the tribunal set up by the Defence (General) Regulations, 1939, reg. 22 (9), but, before the complaint had been C heard, she was charged, under reg. 22 of those regulations with having on Nov. 1, 1939, when served with a billeting notice, failed to comply with the notice. At the hearing before the justices, it was contended on behalf of the respondent that, as she had complained against the billeting notice, it did not become operative until the complaint had been determined by the tribunal. On behalf of the appellant, it was contended that the notice was operative from the moment when it was D served, and remained operative unless and until it was cancelled or varied by the tribunal:—

HELD: it was clear from the terms of the regulation that the notice was operative from the moment when it was served, and that its operation was not stayed by the appeal to the tribunal.

[EDITORIAL NOTE. The regulations require a householder duly served with a E billeting notice to comply with it, but he has a right of appeal. The only question in this case is whether the lodging of such an appeal operates as a stay and justifies non-compliance with the notice. It is held as a matter of construction that that is not so, but it would appear from the facts of this case that there are cases where it ought so to operate.

As to BILLETING, see BUTTERWORTHS' EMERGENCY LEGISLATION SERVICE, F REGULATIONS, Vol. 1 [13], 31.

APPEAL by the Crown by way of case stated from a decision of the East Norton (Leicestershire) justices. The respondent, whose husband was the driver of a school omnibus, was asked to receive two evacuated G children, who were, at the time of the service of the billeting notice, in quarantine after having suffered from diphtheria. She refused to receive them, and lodged an appeal to the appropriate tribunal. The billeting officer, before the appeal could be heard, commenced a prosecution for refusal to receive the children, and the question here in issue is whether H the appeal operated as a stay so that the billeting notice ceased to be operative.

Valentine Holmes for the appellant.

R. T. Paget for the respondent.

HAWKE, J.: The court are of opinion that this case must go back to the magistrates with a direction that they were wrong in thinking that this notice was inoperative. We want to be particularly careful about the form in which we send it back to them, because, although we think that the argument of counsel for the appellant is right, and that the appeal did not operate as a stay of the operation of the notice, the magistrates dealt with it on the ground that the respondent was innocent of any offence under the Defence (General) Regulations, 1939. We think that that was wrong. We are respectfully requested to reverse or amend the magistrates' determination, or remit the matter to them with the opinion of the court thereon. That we can do, but nothing we say is intended to deprive the magistrates of the complete discretion which they have under the Probation of Offenders Act, 1907, s. 1. As I understand that section, they can convict, they can inflict a penalty, or they can dismiss the case under the powers of that Act, and we have no wish to fetter any of the powers given them by that Act of Parliament.

As to the case itself, we are asked to come to a conclusion as to the true construction of these regulations. It may be that these regulations show some sign of having been prepared in haste, but I think that their meaning is perfectly clear. If people are to be called upon to take children under this evacuation scheme, a billeting officer is given authority to act in billeting the persons to be billeted. He must serve upon the occupier of the premises a written notice requiring the occupier of those premises to furnish therein, while the notice remains in force, such accommodation as may be specified in the notice for such persons as may be there specified. He is a person to whom a certain degree of discretion is given, because, apart from giving the notice, he can revoke it, and it may be revoked by a tribunal after a time, and, as counsel for the respondent points out, that can be done on appeal. What we have to consider is the position of the notice, if somebody has appealed, pending the hearing of the appeal. We have nothing to do with the merits of the appeal. We have to determine the true construction of these regulations. Reg. 22 (8) provides as follows:

> If any person contravenes or fails to comply with the requirements of a billeting notice [he is guilty of an offence].

Counsel for the respondent asks us to read that regulation, as follows: "If any person contravenes or fails to comply with the requirements of a billeting notice, he is guilty of an offence unless he has first appealed to the tribunal." I do not think that that is so. There may be reasons for making these regulations. It may be that the government, or those who make these regulations, have to consider what is the greatest good for the greatest number. It is easy enough to conceive cases in which great hardship may result if the notice is given and persisted in. Great hardship may occur pending the decision of the appeal. That is a matter which I think these sections assume must follow these regulations, because we are considering, not an individual, but the population in general.

I think that this case must go back to the magistrates, with the direction that they were wrong in holding that the notice had ceased to operate, and they must deal with the case on the assumption that the notice was still operative and that the respondent ought to have complied with its requirements. What their decision will be is a matter for them. We can only say that all their rights and obligations remain.

A CHARLES, J.: I agree, and will only add a few words because we are told—and, I have no doubt, rightly told—that the decision of this court upon this case stated may affect a very large number of cases all over the country. On Nov. 1, 1939, Mrs. Toone, the respondent, was served with a notice by a properly constituted billeting officer, and that written B notice required her to furnish at her house board and lodging for two children named in the notice. For reasons which she believed, I have no doubt, to be perfectly correct, and, indeed, perhaps overwhelming from her point of view, she refused to accept the children within the house, and so an information was laid, and heard by the justices C for the county of Leicester at East Norton, charging her with failing to comply with the requirements of that notice. The magistrates heard the matter and dismissed the information, on the ground that they considered that, inasmuch as Mrs. Toone, in accordance with her undoubted right, had appealed to the tribunal set up by the Defence D (General) Regulations, 1939, she had stayed the operation of the billeting notice which had been served on her on Nov. 1, 1939. The matter to be considered is put very clearly in paras. 5 and 6 of the case stated:

> 5. After the case for the appellant had been opened, but without any admission by the respondent as to any of the allegations made therein, save as set out in E para. 4 hereof, and before any evidence was called by either party, it was submitted on behalf of the respondent that, since she was aggrieved by the service upon her of the said notice, and had complained to the aforementioned tribunal, the said notice did not become operative until such complaint had been determined by the said tribunal, and that, therefore, the respondent could not be guilty of the offence charged. 6. On the part of the appellant, it was submitted that the said notice was operative from the moment when it was served and remained operative F unless and until it was cancelled or varied by the said tribunal on the hearing of a complaint by the respondent.

The magistrates accepted the submission made by the respondent, and on that ground they dismissed the summons. They were quite entitled to dismiss the summons under the Probation of Offenders Act, 1907, G if they considered that the circumstances warranted them in so doing, but they could not, we think, lawfully dismiss the summons on the ground that no offence had been committed. I think myself that a mere reading of reg. 22 (9) makes it clear that, once the notice is served, it is alive, and remains alive, unless it is removed by revocation by the billeting H officer, or by a decision contrary to the billeting officer's judgment by the tribunal, for reg. 22 (9) provides as follows:

> . . . any person who is aggrieved by the service upon him of a billeting notice, or by the operation of a billeting notice served upon him, may, subject to, and in accordance with, rules made by the Minister of Health, make a complaint to a tribunal constituted under this paragraph: and upon hearing the complaint the tribunal may cancel or vary the billeting notice as the tribunal thinks fit.

It is to be observed that no period is given limiting the time within which such an appeal may be made. It might not be made for some time, and, when it was made, the tribunal might cancel or vary the existing notice. It presupposes that the notice is in existence, and it in no way provides for a suspension of the operation of that notice because at some undefined time the recipient of the billeting notice gives notice that she intends to appeal. The policy of these regulations is quite clear. They are emergency regulations, and, although it may be that here and there there may be hard cases, yet, where one is dealing with these regulations, and with tens of thousands of young people, the object of the regulations is to put the children into safety. In doing so, as I say, it may be that here and there, as indeed perhaps in this instance, someone is asked in unfortunate circumstances to give housing room and lodging to children, but still we are concerned only with the interpretation of these regulations, and it appears to me, for the reasons which I have given, that the regulations—although I agree with Hawke, J., that in some way they do show haste in the way in which they are expressed—are really perfectly clear in their meaning. I agree with Hawke, J., that this case must be remitted to the magistrates, who can exercise their discretion under the Probation of Offenders Act, 1907.

Macnaghten, J.: I am of the same opinion. The magistrates dismissed the summons on the ground that the billeting notice was not operative because the respondent, 2 days after the service of the billeting notice, had given what has been described as a notice of appeal to the tribunal constituted by the Minister of Health under the statutory regulations which have been put in evidence. Of course, that was no valid reason for dismissing the summons. In my opinion, the notice was operative from the moment it was served. The case must, therefore, go back to the magistrates to hear and determine, and, when they have heard and determined, it will be then open to them to arrive at precisely the same result as that at which they have already arrived—namely, that the summons should be dismissed—because, by the Probation of Offenders Act, 1907, s. 1, it is provided as follows:

> (1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either (i) dismissing the information or charge; or . . .

If the magistrates, when they hear the summons, come to the conclusion that the offence was committed—which seems probable on the facts stated but not yet proved—it will be open to them, if they find the facts stated in the notice of appeal proved, to come to the conclusion that the offence was committed in extenuating circumstances, and, if they think fit to do so, to dismiss the summons once again.

Appeal allowed and case remitted to justices to hear and determine.

Solicitors: *Treasury Solicitor* (for the appellant); *Bennett, Ferris & Bennett*, agents for *Bray & Bray*, Leicester (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

TIBBER *v.* UPCOTT.

[COURT OF APPEAL (Slesser, Luxmoore and Goddard, L.JJ.), **February 7, 8, March 4, 1940.**]

Landlord and Tenant—Rent restriction—Registration of premises as decontrolled—Effect of failure to register—Rent and Mortgage Interest Restrictions Act, 1923 (*c.* 32), *s.* 2—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (*c.* 32), *s.* 2 (2)—*Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 71), *s.* 9 (3), *Sched. II.*

Certain premises, the rateable value of which was such as to bring them within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 2, were admittedly decontrolled in 1932. The landlord neglected to register the premises as decontrolled in accordance with the provisions of subsect. (2) of that section:—

HELD: the failure so to register the premises caused them to be controlled premises as from the date of the passing of the Act of 1933.

[**EDITORIAL NOTE.** The decision here made by the Court of Appeal is implicit in the decision in *Stokes* v. *Little* (1), but there the decision was only concerned with the effect of the subsection where the landlord obtained a certificate that there was a reasonable excuse for his failure. In the present case, there was a total failure to register the house as decontrolled, and it is held that the house is recontrolled for all the purposes of the Acts.

AS TO REGISTRATION TO AVOID RECONTROL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 318, 319, para. 378; and FOR CASES, see DIGEST, Supp., Landlord and Tenant, Nos. 7358d-7361c.]

Case referred to:

(1) *Stokes* v. *Little*, [1935] 1 K.B. 182; Digest Supp.; 104 L.J.K.B. 38; 152 L.T. 18.

APPEAL by the plaintiff from a judgment of His Honour JUDGE T. E. HAYDON at Kingston-on-Thames County Court on Dec. 19, 1939. The claim was one by a landlord for rent, and the defence was that the premises were controlled under the Rent Acts and that rent had been overpaid. The facts are fully set out in the judgment of the court delivered by LUXMOORE, L.J. The county court judge found that the premises were controlled, and the plaintiff appealed.

F. W. Beney for the appellant.

S. N. Bernstein for the respondent.

Beney: The premises became decontrolled under sect. 2 of the Act of 1923 when the plaintiff entered into possession in Sept., 1932. The passing of the 1933 Act did not have the effect of bringing the premises again under control. If, however, in any proceedings in court after the passing of the Act of 1933, it appeared that the plaintiff had not applied to register the house as decontrolled in accordance with sect. 2 (2) of that Act, the house would then be deemed to be controlled, notwithstanding that it would otherwise remain decontrolled. By not applying to register with in the proper time, the plaintiff ran the risk that, if proceedings were commenced by either side and the fact that he had not applied came to light in those proceedings, he would lose his right to claim the contractual rent. That part of sect. 2 (2) which provided the tenant with that opportunity was in the nature of a statutory rule of evidence in legal proceedings. On the passing of the Act of 1939, sect. 2 (2) of the Act of 1933, *inter alia*, was repealed. Thereby, unless the Interpretation Act, 1889, s. 38, involved a different result, the tenant lost any further right to take advantage in any proceedings of the opportunity given him by sect. 2 (2) of the 1933 Act. The proceedings here were not commenced until after the repeal, and the opportunity which the repealed subsection gave to a tenant could not properly be described as a right or privilege which had accrued to the tenant at the date of the repeal. If the contrary view is true, under these Acts the landlord had 3 months to make application. If he had made application at the end of that period, or on the last permitted day, the result would be that, between July 18, 1933, and the day 3 months afterwards when he applied to register, only a controlled rent would be payable. The tenant could thereby recover any amount overpaid during the 3 months.

Bernstein : By sect. 4 (2) of the 1938 Act, the last date for registering property as decontrolled was May 26, 1939. By sect. 4 (4) (*a*), the last date for the registration of this house, a C class house, was Aug. 26, 1938—that is, 3 months after the passing of the Act. By sect. 2 (2) of the 1933 Act, before premises can be deemed to be controlled, it must be shown that they would have been controlled but for sect. 2 of the 1923 Act, and also that the landlord had not registered them. For this reason, there could be no further proceedings, for one of the two conditions had not been fulfilled. Sect. 2 (2) of the 1933 Act was repealed by the 1939 Act, for the sole reason that it had ceased to have any operative effect.

LUXMOORE, L.J. [delivering the judgment of the court]: On Oct. 25, 1939, Maurice Tibber sued the defendant, T. H. Upcott, in the Kingston-on-Thames County Court for the sum of £20 11*s.* 8*d.*, claimed as arrears of rent for a flat known as No. 4, Clarence Road, Wimbledon, which on Apr. 12, 1937, the plaintiff had let to the defendant at a weekly rent of 21*s.* The defendant resisted the plaintiff's claim on the ground that at all material times before the passing of the Rent and Mortgage Interest Restrictions Act, 1939, the premises were controlled premises within the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920-1938, and on this basis he alleged that he had paid to the plaintiff more rent for the flat than the plaintiff was legally entitled to require. The action came before His Honour JUDGE HAYDON at the Kingston-on-Thames County Court by way of preliminary hearing in order to determine the legal questions raised. The judge decided that the premises were not decontrolled at any material date, and that the defendant's rights in respect thereof, having all A occurred before the passing of the Act of 1939, were to be ascertained under the provisions of the earlier Acts. He therefore remitted the action to the registrar to ascertain the amount of the controlled rent, and to quantify the rights of the parties to the action as the result of such ascertainment.

B The plaintiff has appealed to this court from the judge's order. He claims that, upon the true construction of the material provisions of the Rent and Mortgage Interest Restrictions Acts, 1920-1938, the premises were decontrolled immediately before the Act of 1939 came into force, and that, although, as is admitted, they became again controlled by C reason of the provisions of the 1939 Act, the proper rent which the plaintiff is entitled to require the defendant to pay for the premises is the 21*s.* per week agreed to be paid on Apr. 12, 1937, and that that rent is the rent prevailing at the date when the Act of 1939 came into force.

D The material facts are as follows. The plaintiff is, and was at all material times, the owner of a building in Clarence Road, Wimbledon, which contained two separate dwellings within the meaning of the Acts. One of these dwellings was known as No. 4, and the other as No. 4A, Clarence Road. It is common ground that each of these dwellings E was controlled on July 31, 1923, the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1923. In 1932, No. 4, Clarence Road, was let to a tenant named Weaver. He left the premises on Sept. 5, 1932, and, before there was any reletting, the plaintiff came into possession of them. No. 4, Clarence Road, therefore, became F decontrolled on Sept. 5, 1932, by reason of the provisions of sect. 2 of the Act of 1923. The plaintiff subsequently let the premises to one Wild at a weekly rent of 22*s.* 6*d.*, and subsequently there were other lettings. On Apr. 12, 1937, the premises were let to the defendant at a weekly rent of 21*s.*, payable in advance. The defendant's claim is G that, at the date of the letting to him, the premises were controlled by reason of the failure of the landlord to comply with the provisions of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Sect. 2 (3) of this Act provides that, if the landlord of any dwelling-house let as a separate dwelling immediately before the passing of the H Act—that is, July 18, 1933—being a dwelling-house of which the rateable value on the appointed day—that is, Apr. 6, 1931—does not (as is admitted in this case) exceed the amount mentioned in the proceeding subsection, claims that, by virtue of the provisions of sect. 2 of the Act of 1923, the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall, within 3 months after the passing of the Act of 1933, make to the council of the county borough or county district in which the dwelling-house is situated (in this case, the county borough of Wimbledon) application in the prescribed form for registration of the dwelling-house. So far, the provisions of the subsection appear to be straightforward. The difficulties of the case arise from the concluding part of the subsection, which provides as follows :

> . . . if in any proceedings with respect to any dwelling-house which is, or immediately before the passing of this Act formed part of, such a dwelling-house as aforesaid, it is proved that but for the provisions of the said sect. 2 of the Act of 1923 the principal Acts would have applied to the dwelling-house, and that no such application has been made by or on behalf of the landlord within the time aforesaid, the dwelling-house shall, subject as hereinafter provided, be deemed to be a dwelling-house to which the principal Acts apply . . .

This subsection is followed by a proviso, to which reference is made later.

It is common ground that no application was made by or on behalf of the plaintiff for the registration of No. 4, Clarence Road, as a decontrolled house, in accordance with the provisions of the subsection which has been read. No doubt there was an intention to comply with the subsection, but, by mistake, on July 18, 1933, the plaintiff applied for and obtained the registration of No. 4a, Clarence Road, as a decontrolled dwelling-house. The county court judge pointed out that, even if there had been an application to rectify the register, he had no power so to do.

The proviso to the section is in these terms :

> Provided that if, on application to the county court of the district in which the house is situated, the court certifies that there was reasonable excuse for the failure to make application for the registration of the dwelling-house within the time aforesaid [3 months after the passing of the Act] and application for registration is made within 7 days after the certificate has been granted, then, if the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, sect. 2 of the Act of 1923 shall, notwithstanding anything in the last foregoing subsection, apply to the dwelling-house as from the date on which the application for registration is made.

No application was made under this proviso in respect of No. 4, Clarence Road.

The result of the failure to apply for the registration of No. 4, Clarence Road, as a decontrolled house appears to be that the premises became recontrolled as from July 18, 1933. In our judgment, this follows from the decision of this court in *Stokes* v. *Little* (1). In that case, a house, of which the standard rent while it was controlled was 8*s*. 6*d*. per week, came into the possession of the landlord on Oct. 10, 1932, and thereupon became decontrolled by reason of the provisions of sect. 2 of the Act of 1923. The landlord failed to register the dwelling-house as a decontrolled house within the period of 3 months from the passing of the Act of 1933, as required by sect. 2 of that Act, but subsequently obtained from the county court a certificate that there was reasonable excuse for the failure to register. The landlord duly made the application for registration within the time limited by the Act of 1933, and registered the premises. The Court of Appeal held that the effect of the registration was to place the dwelling-house, as from the date of such registration, in the same position as that in which it would have been if it had been registered within the 3 months allowed by the Act, A and that the landlord suffered no further detriment through the delay than such as might result from the application of the Act of 1933 between the date of the passing of that Act and the application to register. LORD WRIGHT said, at p. 190:

> Sect. 2 of the Act of 1933 first of all enacts that sect. 2 of the Act of 1923 (which B provides for the exclusion of dwelling-houses from the application of the principal Act in certain cases) shall not apply to the classes of houses there specified. The effect so far is not only to stop future claims that such houses are entitled to be excluded, but to bring back into the Act, subject to the qualifications set out, even those houses of the specified rental or rateable values which had been excluded by sect. 2 of the Act of 1923, and to abrogate the rights vested in the landlords by that section. This is, no doubt, a harsh measure: but Parliament which gave can take away. The words "shall not apply" accordingly refer in this way to the C past operation of sect. 2 of the Act of 1923.

It seems to us that it is implicit in this decision that, in the event of non-compliance with the provisions as to registration, whether under the first part of subsect. (2) or under the proviso thereto, the dwelling-house is again brought within the principal Acts, and becomes, by D reason of the non-registration, a controlled dwelling-house. SLESSER, L.J., said, at p. 197:

> It is scarcely disputed that had the landlord duly registered before Oct. 18, 1933, she would have been able to have claimed that sect. 2 of the Act of 1923 would have applied; that, having been in possession, and having satisfied the requirements of sect. 2 of the Act of 1923, her dwelling-house would have been E outside the Act. To my mind the proviso does no more, when its conditions are satisfied, than to postpone the date when the landlord may claim that her dwelling-house is excluded from the Act to the date of the application for registration which follows upon the certificate. To give any further effect to this proviso and to hold, as the learned judge appears to have done, that the proviso does no more than give the landlord a right after the registration to enter into possession and for the first time to take advantage of sect. 2 of the Act of 1923, is to hold that the F proviso, when satisfied, has produced an entirely new legal situation, with consequences different from the case where registration is within the three months of the passing of the Act, and that the proviso is not merely dealing with the correction of an omission, with consequences as to the time to which rights may be postponed, but is assuming that, after the lapse of the first period for registration, the subsequent registration will produce a more restricted legal right in the landlord by excluding her right to rely upon the fact that she has already once G entered into possession, and to require a further new entry.

However, counsel for the plaintiff landlord has argued that the effect of sect. 2 (2) of the Act of 1933, in the event of its provisions as to registration not being complied with, is limited with regard to recontrol. He claims that, once a dwelling-house has been decontrolled under H the provisions of sect. 2 of the Act of 1923, failure to register under sect. 2 of the Act of 1933 affects the decontrol only in so far as "any proceedings" are concerned, so that, apart from such proceedings, the dwelling-house remains decontrolled.

The section is obviously difficult to construe. If the contention of counsel for the plaintiff landlord is correct, we find it impossible to formulate any purpose for which the decontrol is to remain effective, because all that is required to establish that the dwelling-house has become recontrolled is to start proceedings and to establish therein that there has been no application for registration under sect. 2 of the Act of 1933. In our judgment, the true meaning of sect. 2 of the Act of 1933 is that, in the absence of registration under its provisions, a dwelling-house which has become decontrolled under sect. 2 of the Act of 1923 becomes, for all purposes of the principal Acts, a controlled house.

Counsel for the landlord further argued that the provisions of sect 2. of the Act of 1933 were concerned solely with matters of procedure, and that, consequently, such provisions ceased to have any operation after they had been repealed by the Rent and Mortgage Interest Restrictions Act, 1939 (see sect. 9 (3) and Sched. II of that Act). As already pointed out, we are of opinion that sect. 2 of the Act of 1933 is not concerned merely with procedure, but gives to a dwelling-house falling within its provisions the status of a controlled dwelling-house. Further, we think that, under the Act of 1933, the tenant of a house within the provisions of sect. 2 of that Act acquired, by reason of the failure of the landlord to comply with the provisions of that section, such rights and benefits as attach to a house controlled under the principal Acts. There is nothing in the 1938 Act which can be construed as depriving the tenant of such rights, and we are satisfied that, by reason of the provisions of the Interpretation Act, 1889, s. 38, the defendant, as such a tenant, is entitled to enforce his vested rights. For these reasons, we agree that the decision of the county court judge is right, and, consequently, that the appeal must be dismissed with costs.

Appeal dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors: *Paisner & Co.* (for the appellant); *Barnett Janner* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

R. *v.* CARMICHAEL.

[Court of Criminal Appeal (Charles, Macnaghten and Oliver, JJ.), **March 11, 19, 1940.]**

Criminal Law—Evidence—Admissibility—Rule in Russell v. Russell—Incest—Accused's daughter—Accused wishing to adduce evidence of lack of knowledge that girl was his daughter—Punishment of Incest Act, 1908 (*c.* 45) *s.* 1 (1).

The appellant was convicted on 3 counts of an indictment charging him with having had carnal knowledge of S., who was to his knowledge his daughter. On Sept. 2, 1912, the appellant married P., and two children were subsequently born—namely, E. on Apr. 11, 1913, and S., the subject of the charge, on May 18, 1915. The appellant was admittedly the father of E. Throughout the whole of 1914, the appellant and his wife lived apart in different towns, though he visited her during the week-ends. There was evidence that about Aug., 1914—9 months before S. was born—the appellant's wife was associating with W., though there was no evidence of actual misconduct at that time. In Nov., 1916, the appellant petitioned for divorce on the ground of his wife's adultery with W., and in due course the marriage was dissolved. On July 10, 1918, the appellant remarried, and in 1926 the two girls came to live with him and his second wife. In 1932, the husband and his second wife separated, and the appellant then lived with S., who gave birth to 3 children. At the trial, the appellant wished to adduce evidence that his first wife had told him that S. was begotten by another man, and also that he had told his second wife that he was not the father of S. The judge ruled, however, that the rule in *Russell* v. *Russell* (1) precluded the appellant from adducing any such evidence. On appeal from his conviction, the appellant contended that the judge was wrong in law in this ruling, and that by so ruling he had wrongly excluded vital evidence tending to show that the appellant did not know that S. was his own daughter :—

Held : the evidence sought to be adduced by the appellant did not infringe the rule in *Russell* v. *Russell* (1), and was admissible. Though it was irrelevant to the question of the paternity of S., it was plainly relevant to the question of whether or not the appellant knew that S. was his daughter, since, if the jury were satisfied as to the truth of the evidence, they would have been bound to have returned a verdict of acquittal. The question whether A. is B.'s daughter is totally distinct from the question whether to B.'s knowledge she is his daughter.

[**EDITORIAL NOTE.** The rule in *Russell* v. *Russell* (1) is one which many feel should be as restricted as possible in its application. It may be doubted whether it applies in criminal matters, but, however that may be, the present case merely decides that it does not, in a case of incest, preclude the admission of evidence tending to prove that the accused did not know that the person with whom incest was charged was his daughter. Where proof of knowledge is vital to a conviction, the admission of evidence of the prisoner's knowledge or want of knowledge is one of the most elementary rights.

As to Incest, see HALSBURY, Hailsham Edn., Vol. 9, p. 484, para. 830 ; and for Cases, see DIGEST, Vol. 15, pp. 852, 853, Nos. 9352-9362.]

Case referred to :

(1) *Russell* v. *Russell,* [1924] A.C. 687 ; Digest Supp. ; 93 L.J.P. 97 ; 131 L.T. 482.

Appeal against a conviction by Wrottesley, J., at the Central Criminal Court on Feb. 8, 1940, of incest with the appellant's daughter.

The facts and arguments are fully set out in the judgment of the court delivered by Charles, J.

E. Clarke for the appellant.

G. Howard for the Crown.

Charles, J. [delivering the judgment of the court]: On Feb. 8, 1940, at the Central Criminal Court, before Wrottesley, J., John Kinnear Carmichael was convicted of incest with his daughter, Sonia May Carmichael, and was sentenced to 2 years' imprisonment. He now appeals against his conviction, on the grounds of the wrongful exclusion of evidence. The indictment contains three counts. The first count charged that on a date unknown between June 1, 1932, and May 2, 1933, the appellant "had carnal knowledge of Sonia May Carmichael, who was to his knowledge his daughter." The second and third counts charged the commission of similar offences between Aug., 1934, and Aug., 1937.

There was little or no dispute as to the facts of the case. On Sept. 2, 1912, the appellant married Frances May Parker at the register office at Edmonton, in Middlesex, and there were two children of the marriage—namely, Elsie Frances Carmichael, born on Apr. 11, 1913, and Sonia May Carmichael—the subject of the present charge—born on May 18, 1915. The appellant was admittedly the father of the elder daughter, Elsie Frances.

Throughout the whole of 1914, the appellant's wife lived at Cambridge and the appellant resided in London, where he was engaged in a motor business, and during that year he used from time to time to visit his wife at week-ends. There was evidence that about Aug., 1914—9 months before the birth of Sonia May Carmichael—the appellant's wife was associating with a man named Harry West, who was giving her lessons in motor-driving, but there was no evidence of any misconduct by her with West at that time. In Jan., 1915, the appellant enlisted in the Army, and in the autumn of that year he went with his regiment to France. While the appellant was away in France, his wife committed adultery with West, and on Nov. 17, 1916, the appellant presented a petition for divorce, and cited West as co-respondent. The petition alleged that during 1916 Mrs. Carmichael had frequently committed adultery with West, and that she was at that date pregnant by him. On this petition, a decree *nisi* was pronounced, and in due course the decree was made absolute and the marriage was dissolved.

On July 10, 1918, the appellant married Violet May Garrick. After the dissolution of his first marriage, the two girls, Elsie and Sonia, lived under the care of the appellant's mother, but in 1926 they came to live with the appellant and his second wife. In 1932, the appellant and his second wife quarrelled, and separated. The quarrel was due to the fact that Mrs. Carmichael became suspicious about the appellant's feelings towards Sonia. After this separation from his second wife, the appellant lived with Sonia, and, between the dates mentioned in the indictment, she gave birth to three children. The appellant was admittedly the father of those children, and there was ample evidence that on a number of occasions he had acknowledged that he was the father of Sonia. In his petition for divorce, and in his affidavit verifying the petition, he had stated :

> There was living issue of the marriage two children—namely, Elsie Frances Carmichael, born on Apr. 11, 1913, and Sonia May Carmichael, born on May 18, 1915.

On the evidence set out above, the jury found the appellant guilty of the charges made against him.

Incest was made a criminal offence by the Punishment of Incest Act, 1908, s. 1, which provides as follows :

> (1) Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother, shall be guilty of a misdemeanour . . .

It was therefore incumbent on the Crown to prove to the satisfaction of the jury (i) that the appellant was in fact the father of Sonia, and (ii) that he knew that he was her father. Proof that Sonia was in fact his daughter would not be sufficient to justify a conviction, unless it was also proved that the appellant knew that she was his daughter. If the appellant could have proved to the satisfaction of the jury that he believed she was not his daughter, or even if the jury had reasonable doubt as to that matter, he would have been entitled to a verdict of acquittal.

The grounds of appeal against the conviction are as follow—namely, (i) that the judge was wrong in law in holding that the rule in *Russell* v. *Russell* (1) applied to the case, and that no statement by the appellant or his first wife which tended to bastardise any issue of that wife born in wedlock could be admitted, (ii) that the judge misdirected the jury in his summing up when he told them to disregard all statements made by the defendant or by his first wife which tended to bastardise Sonia May Carmichael, and (iii) that the judge thus wrongly excluded vital evidence tending to show that the appellant did not know that Sonia May Carmichael was his own daughter. This appeal, therefore, raises an interesting and important question with regard to the application, on a trial for incest, of the rule of law, affirmed by the House of Lords in *Russell* v. *Russell* (1), that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock.

The case for the appellant was this. Conceding that there was no evidence to rebut the presumption that he was the father of Sonia, and that the Crown had proved that fact conclusively, the appellant desired to give evidence that his former wife had told him that Sonia was begotten by another man, and that he honestly believed her statement to be true, and that, therefore, so far from knowing that Sonia was his daughter, he believed the contrary. As proof of the sincerity of his belief, he desired to give evidence that he had informed his second wife that he was not Sonia's father. Further, he desired to explain how it came about that in his divorce petition and on other occasions he had acknowledged Sonia as his daughter. The judge, however, held that the rule in *Russell* v. *Russell* (1) precluded the appellant from adducing any such evidence, and the question at issue on this appeal is whether that ruling was right. In our opinion, that ruling was wrong.

At the trial, the question arose first when the appellant's second wife, who was called as a witness for the Crown, was giving evidence. Counsel for the appellant desired to ask her in cross-examination whether it was not the fact that the appellant had informed her that he was not the father of Sonia, and the judge, after hearing the matter argued in the absence of the jury, held that the rule in *Russell* v. *Russell* (1) made any such question inadmissible. After the close of the case for the Crown, the appellant gave evidence on his own behalf. The judge allowed his counsel to ask the appellant this question :

> At the time you had intercourse with Sonia, did you know she was your daughter ?

To that question he replied :

> I knew she was not my daughter.

Directed by the judge, however, that he must answer Yes or No, he replied "No." Counsel for the appellant then proposed to ask the appellant his reasons for disbelieving that he was the father of Sonia, and formulated the following question : "Who first informed you that Sonia was not your daughter ?" The answer to that question would have been that it was the mother of Sonia herself who gave him that information. The judge, however, disallowed the question, on the ground that the answer would infringe the rule in *Russell* v. *Russell* (1).

With the greatest respect to the judge, we think that the question was admissible. Evidence by the appellant that his wife had told him that he was not the father of Sonia was no evidence at all that he was not in fact her father, and was irrelevant and inadmissible on the question of the paternity of the child. In our opinion, such evidence would not in any way infringe the rule in *Russell* v. *Russell* (1). Though it was irrelevant to the question of the paternity of Sonia, it was plainly relevant to the question whether or not the appellant knew that Sonia was his daughter, since, if the jury were satisfied (i) that Sonia's mother did in fact tell the appellant that he was not the child's father, and (ii) that the appellant believed her statement to be true, then they would have been bound to return a verdict of acquittal. Indeed, by the exclusion of this evidence, the appellant was deprived of the right to substantiate his plea that Sonia was not, to his knowledge, his daughter. To preclude a defendant on his trial from giving evidence of his belief, and the ground for it, seems to us to deprive him of one of the most elementary rights of an accused person, and to be a negation of justice where the proof of knowledge or no knowledge is vital to conviction or acquittal.

The exclusion of this evidence, moreover, led to the curious result that, while the appellant was permitted to deny on oath that he knew Sonia to be his daughter, not only was he precluded from giving his A reasons for believing that he was not her father but the Crown was also precluded from cross-examining the appellant as to his reasons for his alleged belief. Moreover, evidence of admissions by the appellant that Sonia was his child had been adduced on behalf of the Crown, yet statements to the contrary by the appellant, which might have explained B away those admissions, were, by the ruling, excluded. In our opinion, the rule in *Russell* v. *Russell* (1) did not preclude the appellant from giving any relevant evidence in support of his plea that he did not believe that Sonia was his daughter, including an admission or confession by her mother.

C It is true that LORD SUMNER in the course of his dissenting opinion in *Russell* v. *Russell* (1) suggests, at p. 739, as a reason for differing from the majority, the hardship the rule would work in an incest case, and instances an example closely approximating to the facts of this case. It is to be observed, however, that he treats the matter as if the words of the D statute, " who is to his knowledge his . . . daughter," form no ingredient in the offence. Thus, he says, at p. 739 :

> His one defence is that, though born of his wife during their marriage and brought up as his child to avoid scandal, he had not begotten her. . . If he can give this evidence he has a defence to go to the jury ; if, on the other hand, the rule applies . . . he will go to prison.

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In our opinion, the question whether A is B's daughter is totally distinct from the question whether to B's knowledge she is his daughter. Knowledge is vital to the commission of the offence. While there was evidence in this case on which the jury might well have convicted the appellant, F yet we cannot say that, if the evidence which was ruled out had been given, they would have done so, and we have accordingly allowed the appeal and quashed the conviction.

Appeal allowed and conviction quashed.

Solicitors : *Registrar of Court of Criminal Appeal* (for the G appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

UNITED STEEL COMPANIES, LTD. *v.* CULLINGTON.

[House of Lords (Viscount Caldecote, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Romer), **February 19, 20, March 19, 1940.**]

Income Tax—Deductions against profits—Wear and tear—Trading losses—Carrying forward deductions—Amalgamation of companies—Right of new company to accrued deductions of constituent companies—Income Tax Act, 1918 (*c.* 40), *Sched. D, Cases I and II, rr.* 6, 11—*Finance Act,* 1926 (*c.* 22), *ss.* 32, 33—*Companies Act,* 1929 (*c.* 23), *ss.* 153, 154 (1).

The U.S. & B. Mills, Ltd., had been carrying on a business for a number of years before 1930, and had at no time made any profit. A large sum had accumulated in respect of allowances for wear and tear and trading losses, which had been carried forward from year to year. The U.S. Co. had similarly accumulated allowances in respect of wear and tear and trading allowances. On Aug. 22, 1930, these two companies were amalgamated into one company, but in fact the two businesses were carried on as branches of the one company :—

Held : (i) the new company was not entitled to carry forward the wear and tear allowances, since they had not been suffered by the new company in the course of its trading.

(ii) the allowances claimed on account of trading losses incurred by the previous owners of the trade were not permissible for the purpose of an assessment to income tax made upon the new company.

Order of Court of Appeal ([1939] 1 All E.R. 454) *affirmed.*

[**EDITORIAL NOTE.** A company formed by the amalgamation of two other companies is in law a legal entity distinct from the two constituent companies, and it is not, for the purposes of income tax, to be treated as a successor to the constituent companies. The terms of r. 11 are clear, and cannot be read so as to bring in allowances for wear and tear to which a predecessor was entitled.

As to Carrying Forward Allowances, see HALSBURY, Hailsham Edn., Vol. 17, p. 169, para. 344 ; and for Case, see DIGEST, Vol. 28, p. 42, case *m.*]

Case referred to :

(1) *Donoghue* v. *Doncaster Amalgamated Collieries, Ltd., Nokes* v. *Doncaster Amalgamated Collieries, Ltd.,* [1939] 2 K.B. 578 ; [1939] 2 All E.R. 668 ; Digest Supp. ; 108 L.J.K.B. 845 ; *affg.,* [1939] 1 K.B. 70 ; [1938] 4 All E.R.6.

Appeal by the taxpayer from an order of the Court of Appeal (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), dated Feb. 10, 1939, and reported [1939] 1 All E.R. 454, reversing in part an order of Lawrence, J., dated Apr. 7, 1938, and reported [1938] 2 All E.R. 569. The facts and the arguments are fully set out in the opinions of their Lordships.

Raymond W. Needham, K.C., W. Gordon Brown and *J. S. Scrimgeour* for the appellants.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

Viscount Caldecote, L.C. : My Lords, the appellant company was formed on Aug. 22, 1930. Its primary object was the acquisition, on the terms of a scheme of arrangement or amalgamation sanctioned by the High Court of Justice, of the undertakings of two companies which

I will call respectively the steel company and the strip company. The businesses of these two companies were continued by the appellant company as from Aug. 22, 1930, the businesses formerly carried on by the two companies being thereafter treated as branches of the appellant company. The steel company at the date of its acquisition by the A appellant company had in its books a sum representing trading losses of the steel company, in respect of which relief under the Finance Act, 1926, s. 33, had not been given. The strip company had a similar item in its books in respect of which relief had not been given. In addition to this item, the strip company was entitled to a deduction for wear and B tear of plant, but it had not been possible, owing to the losses incurred by that company, to give effect to this deduction. The appellant company claimed the right to set off these three sums against its own profits. The special commissioners found that the appellant company succeeded to the trades of the steel company and the strip company and C falls to be assessed as if a new trade had been set up or commenced. They accordingly held that the appellant company was not entitled to the deductions claimed. LAWRENCE, J., differed from the special commissioners as to the wear and tear claim, but otherwise upheld their decision. The Court of Appeal reversed LAWRENCE, J., as to the D wear and tear item, and decided against the contentions of the appellant company on all points.

My Lords, the deductions claimed are a form of relief from the liability to pay income tax upon profits or gains, and the taxpayer must establish his claim upon a correct interpretation of the language of the material E enactments. The claim to deduct the wear and tear allowance of the strip company from the profits of the appellant company derives from the Income Tax Act, 1918, Sched. D, Cases I and II, r. 6, but the decision ultimately depends on the effect to be given to r. 11, amended by the Finance Act, 1926, s. 32. Before the passing of that Act, Sched. D, F Cases I and II, r. 11, which in its turn replaced the Income Tax Act, 1842, Sched. D, r. 4, provided that the tax payable by a person succeeding to a trade should be computed according to the profits or gains of the trade during the respective periods prescribed by the Act notwithstanding the succession, unless the person succeeding to the trade proved that G the profits or gains had fallen, or would fall, short from some specific cause since the succession took place. If that were the material enactment for your Lordships' consideration, the appellant company would clearly be entitled to a deduction of the wear and tear allowance from its profits. The alteration effected by the Finance Act, 1926, s. 32, was H substantial. The new r. 11 (1) thereby enacted dealt with changes in a partnership, while r. 11 (2) dealt with successions to a trade. The difference in the treatment is remarkable. In the first case, the computation of tax is to be made notwithstanding the change in the partnership, according to the profits or gains of the trade during the periods prescribed by the Income Tax Acts. In the second case, the tax payable by the person succeeding is to be computed as if he had set up or commenced the trade at the time he succeeded, and the tax payable by the person carrying on the trade until that time is to be computed as if the trade had then been discontinued. This direction on the face of it seems to me to conclude this question in favour of the Crown, for, if the tax payable by the appellant company as successor to the trades of the two former companies is to be computed as if the company commenced to trade when it succeeded, it would seem impossible to make a deduction in respect of allowances arising in years of assessment before that which must be taken to be the new trade was set up or commenced.

It was, however, strenuously argued on behalf of the appellant company that r. 11 introduced by the Finance Act, 1926, s. 32, did not relate to the method of computation of profits, but merely altered the basic year of assessment in cases where there was a succession to a trade. My Lords, I confess I had some difficulty in following the argument. In computing the tax payable upon the profits or gains of the trade, part of the process is the deduction of any allowances permitted by the income-tax provisions. As long as the profits and gains under Sched. D were computed on the basis of an average of 3 years, the deduction was made from the figure resulting from the taking of the average, and the balance was the amount of the profits and gains on which tax was charged. When the profits or gains of the year preceding the year of assessment were substituted for the average of the 3 preceding years, the process was the same, so far as a deduction for wear and tear was concerned. The words of the new r. 11 enacted by the Finance Act 1926, s. 32, seem to me imperative and clear, and I see no reason for not giving them their natural meaning.

A further contention which can be dealt with more briefly was made with regard both to the claim in respect of wear and tear and to the claim in respect of losses. Originally, the appellant company claimed, so far as losses were concerned, to be within the Finance Act, 1926, s. 33, apart from the effect of the order of Eve, J. That argument was abandoned in the Court of Appeal, and it is now admitted that the relief which sect. 33 gives is purely personal to the person sustaining the loss. The claim in respect of losses, therefore, rests solely on the sections of the Companies Act and the order of Eve, J. The contention now advanced is that the effect of sect. 154 and of the order of Eve, J., transferring the undertakings of the two companies and of their properties was to transfer the right to deductions to the newly-formed appellant company. This, in my opinion, requires an impossible construction of sect. 154 of the Companies Act and of the order of Eve, J. On both points I agree with the judgment of Finlay, L.J., in delivering the judgment of the Court of Appeal, and I think that this appeal should be dismissed with costs.

Viscount Maugham: My Lords, as appears from the special case, the main questions are whether the appellants, a new company

amalgamated under the Companies Act, 1929, ss. 153, 154, are entitled to deduct wear and tear allowances and losses incurred by the constituent companies for the years before the amalgamation. The appellants acquired their business and undertaking on Aug. 22, 1930, under a scheme of arrangement sanctioned by the court pursuant to the Companies Act,
A 1929, ss. 153, 154. The two transferor companies were the old United Steel Companies, Ltd., and the United Strip and Bar Mills, Ltd., whom I shall refer to as the 1915 steel company and the strip company. These companies had not been successful. They had made large losses in respect of which relief could not be obtained under the Income Tax Act,
B 1918, s. 34. The strip company had also been unable to make the deductions in respect of wear and tear to machinery which it was entitled to make under the provisions of the Income Tax Act, 1918, Sched. D, Cases I and II, r. 6, a rule which I shall refer to as r. 6. The appellants' claim is to carry forward and set off against their own profits the losses incurred by
C the 1915 steel company and the strip company before the amalgamation, and also to deduct from their profits the unapplied balances of the wear and tear allowances of the strip company. The Court of Appeal have decided both these questions in favour of the Crown, varying an order of LAWRENCE, J., who was in favour of the taxpayer, with regard to the
D allowance for wear and tear. There was a further point suggested—namely, that the appellants were entitled to succeed by virtue of the Companies Act, 1929, ss. 153, 154, a contention which was described by the Court of Appeal as somewhat startling.

My Lords, I am content with the judgment of the Court of Appeal on
E all points, and shall trouble your Lordships only with a few observations relative to the claim as regards the wear and tear allowance under r. 6. I will begin by observing that the right under r. 6 is not a chose in action or an asset of the taxpayer, and that it could not be assigned to the appellants. It relates only to deductions allowable to a taxpayer in
F charging the profits or gains of a trade as representing the diminished value by reason of wear and tear of machinery or plant used in the trade by, and belonging to, the taxpayer. Rule 6 (3) allows the deduction to be added by the taxpayer to the amount of the deduction in a subsequent year if there has not been a previous opportunity of making the deduction
G out of profits. It is clear that, if the trader goes out of business, this right to carry forward a deduction is lost, unless, indeed, there is a statutory right given to some other trader, presumably a successor, to deduct the diminished value (by wear and tear) of machinery and plant used by the predecessor from the profits or gains of the successor. It
H will be remarked that the machinery and plant might have been placed on the scrap-heap, or perhaps acquired by the successor for a very small sum. It is a little difficult to see the reason in such a case for giving to the successor the right claimed. However, there is always a possibility of finding in the twists and turns of the income-tax maze some relief or refuge for the harassed taxpayer, and this possibility we must now examine.

My Lords, I agree with the opinion expressed by the Court of Appeal that the point turns upon the proper construction of r. 11, introduced in substitution for an older rule by the Finance Act, 1926, s. 32. The new rule must now be treated as Sched. D, Cases I and II, r. 11. We were urged to regard this rule in relation to its history (which is fully stated in the judgment under appeal) and to its context as one of a A number of rules into which it was introduced. I have carefully borne this precept in mind, but I am nevertheless of opinion that the true construction and effect of the rule are reasonably clear. There are two parts to the rule. Reading it shortly, the first subrule deals with partnerships, and provides that, if a change in the partners has occurred in any B way, one or more partners continuing to be engaged in the business, the tax payable by the continuing partners or partner shall, notwithstanding the change, be computed according to the profits or gains of the trade during the period prescribed by the Income Tax Acts. There is an important proviso to the subrule, which gives the continuing partners C a right by a signed notice to the surveyor to require :

> . . . that the tax payable for all years of assessment shall be computed as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade . . . had been then set up or commenced, and that the tax so computed for any year shall be charged on and paid by such of them as would have been charged if such discontinuance and setting up or commencement had actually taken place . . . D

If such notice is given, " the tax shall be computed, charged, collected and paid accordingly." Subrule (2) applies to the case of any person (which includes a company) succeeding to any trade previously carried on by another person, and it provides that the tax payable for all years E of assessment by the new owner :

> . . . shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued.

My Lords, I am clearly of opinion that, if the proviso to subrule (1) is F brought into operation by an appropriate notice, the new partners cannot obtain the benefit of allowances or deductions available prior to the new trade being commenced. It will be noted that the proviso specifies in some detail the notice which must be given, and such notice itself states the consequences—namely, that the tax is to be computed for any year, G and also charged and paid, as if there were a *new* trade, profession or vocation. It is stated in the judgment under appeal that counsel for the present appellants did not dispute the view of the proviso which I have stated above. This admission was not made before your Lordships, but I heard no argument which led to the belief that the admission was not H rendered necessary by the language of the proviso.

If we turn to the second part of r. 11, which deals with succession to trade by a stranger, the language seems to me almost equally clear. The words " at that time " and " as if it had then been discontinued " are strong to suggest that the tax payable is to be computed for all purposes as if there were a *new* trade, profession or vocation. To my mind, it is at any rate clear that there is no possibility of reading into the rule, or into any other existing rule to which we were referred, a right to exercise the remarkable privilege contended for—namely, that of deducting from profits made after a previous business has been discontinued the diminished value of plant and machinery which the successor has perhaps never acquired. For these reasons, and for those given by the Court of Appeal, I agree that this appeal must be dismissed.

LORD RUSSELL OF KILLOWEN [read by LORD ROMER]: My Lords, the claim of the appellants to be entitled to set off against their own profits allowances for wear and tear which the old companies would have been entitled to carry forward against future profits if they had continued to trade is a claim which, in my opinion, could only be acceded to by completely ignoring, and proceeding in the teeth of, the provisions of Sched. D, Cases I and II, r. 11 (2). It was contended that r. 11 did not relate to the manner in which the profits of any year were to be computed, but merely prescribed, in the case of a change in the ownership of a trade, the period the profits of which were to be the measure of assessment for the year of assessment. In my opinion, the new rule introduced by the Finance Act, 1926, s. 32, goes far beyond that. Under the former r. 11, as under the Income Tax Act, 1842, the cases of changes in the ownership of a trade within the year of assessment, or within what may be called the basic period, were all treated on the same footing, whether or not there was any continuity of ownership—that is, irrespective of the question whether anyone who was an owner before the change was also an owner after the change. By the new r. 11 a sharp distinction is drawn between the two cases. Para. (1) deals with the cases where continuity of ownership exists. Para. (2) deals with the cases where there is a complete break in the ownership of the trade. In the first case, the tax payable by the new owners is computed according to the profits earned during the basic period—that is, earned by the then owners of the trade. The proviso, however, gives an option, if all the owners old and new wish it, of dealing with the matter on the footing of the trade having been discontinued and a new trade set up at the date of the change. Rule 11 (2), however, prescribes only one method of computing the tax payable. It postulates that one person has succeeded to a trade "which until that time was carried on by another person." That is to say, it postulates a complete break in the ownership. In such a case, it provides that the tax payable by the new owner shall be computed as if he had set up the trade when he became owner, and that the tax payable by the old owner shall be computed as if the trade had then been discontinued. In the face of that provision, it is impossible to hold that the new owner (whose business is to be treated, for the purpose of computing the tax payable by him, as a brand new business) can have any claim to allowances, in virtue of allowances for wear and tear carried forward by the old owner.

The judgment of Lawrence, J., on this part of the case is largely, if not entirely, based on a contrast of the wording of the proviso to para. (1) with the wording of para. (2) of r. 11, emphasis being laid upon the words " new trade " in the proviso, and upon the fact that the trade of the new owner in para. (2) is not described as a " new " trade. However, if it once be appreciated that the proviso is dealing with cases in which there is some continuity of ownership, and that para. (2) is dealing with cases in which there is a complete break in ownership, the reason for the difference of wording becomes apparent, and the point disappears. In the proviso, it was necessary specifically to require the trade to be treated as if it were a new trade, because the existence of continuing owners might well have prevented it from being considered to be, or being treated as, a new trade. In the case of a complete break of ownership, the trade in the hands of the new owner, if treated as then set up for the first time, must necessarily be treated as a new trade, and need not be so described.

It was, however, argued that, even if the true construction of r. 11 operated adversely to the contention of the appellants, they were nevertheless entitled to succeed in their claim, and were entitled to exercise the rights which the old companies would have had, had they continued to trade, and this by reason of the order of Eve, J., made under the Companies Act, 1929, s. 154. My Lords, I find a difficulty in discovering in that section any indication that property which the transferor company could not itself have transferred to the transferee company may nevertheless be transferred to that company by the order of the court. It is, however, unnecessary to decide this point, because of the particular right here in question. I desire, however, to reserve for future consideration the question whether *Donoghue* v. *Doncaster Amalgamated Collieries, Ltd.* (1) was rightly decided. The right here claimed is not only personal to the old companies, but is a right which can only be asserted in relation to income tax payable by them respectively in respect of the profits of the trades carried on by them respectively, and, even assuming that the order of Eve, J., operated to vest that right in the appellants, it does not become *in transitu* a right exerciseable in regard to income tax payable by the appellants in respect of the profits of the trade carried on by the appellants.

There remains the claim for allowances in respect of losses carried forward by the old companies. This was rested solely upon the order of Eve, J., and the Companies Act, 1929, s. 154, and must fail with the other claim. For these reasons, I would dismiss the appeal.

Lord Wright: My Lords, the main argument of the appellants was as to the true construction of r. 11 (2), as amended by the Finance Act, 1926 s. 32 The words are in my opinion, quite plain. In the most unequivocal language they sharply divide the trade carried on by the person succeeding from the trade up to the time of the succession carried on by the person to whom the former succeeded. The tax on the former is to be computed as if he had set up or commenced the trade at the time when he succeeded. The tax on the latter is to be A computed on the footing that the trade carried on by him up to the succession had been then discontinued. I cannot better express my reasons for rejecting the appellants' contention than by quoting the words of FINLAY, L.J., in delivering the judgment of the Court of Appeal, ([1939] 1 K.B. at p. 660; [1939] 1 All E.R., at p. 461):

B

> The direction to compute the tax payable can only mean that the tax payable has to be ascertained after making all proper allowances on the basis that the trade was set up or commenced on the last mentioned date. This must of necessity exclude any allowances to which the predecessor might be entitled in respect of the period antecedent to the acquisition of the trade by the successor.

I cannot accept the contention on behalf of the appellants that r. 11 (2), C when it speaks of the computation of the tax, is merely concerned with the change in the period of assessment. My view is, I think, fatal to the claim for allowances for wear and tear, and *a fortiori* to the claim for losses under sect. 33.

However, it was sought to support both claims by relying on the D Companies Act, 1929, s. 154, and the order of EVE, J., made under that Act confirming the deeds of arrangement and amalgamation of the two old companies with the appellant company. The order transferred, so it was contended, to the appellant company the right to the allowances claimed, because, it was said, they were included in the terms of E the order, in that it transferred to the appellant company the properties, rights and powers of every description of the old company. It is, I think, a sufficient answer to this argument that the old companies never had any right to these allowances. I question whether the claim to an allowance under the Income Tax Act, 1918, Sched. D, Cases I and II, F r. 6, can properly come under the description of a property, right or power. In any case, the old companies never had any such right or property or power, however it is described, in respect of these allowances. All they had was a claim to allowances from their own profits in respect of wear and tear or losses. Neither company during its G existence ever had profits or gains from which the deductions now claimed could have been made in whole or in part. The appellant company has been carrying on its own trade as from 1930, and it is in respect of the profits of that trade that the allowances are claimed. The old companies never had any interest in that trade. Their own H trade ceased in 1930. This, I think, is a sufficient answer. It would, however, have been a strange result if the Companies Act, 1929, had by a side wind amended in a substantial particular the Finance Act, 1926. To effect such an amendment, express and apposite words would have been necessary.

The appellants relied, as supporting their construction of the Companies Act, 1929, on the decision in *Donoghue* v. *Doncaster Amalgamated Collieries, Ltd.* (1). That was a decision of the Court of Appeal constituted by the same members as those who gave the judgment under appeal. The powers of sect. 154 were there held to extend to dealing with a purely personal right—namely, a contract of employment. If it were material, I should desire most carefully to consider what was there decided, but the reasons for which I reject the appellant company's contention are sufficient quite apart from any questions considered in *Donoghue's* case (1). Indeed, the members of the Court of Appeal, when they gave their judgment in *Donoghue's* case (1) a few months after their judgment now under appeal, do not refer to the latter, and do not seem to have felt that there was any conflict between their two judgments. I do not here consider it necessary to examine the decision in *Donoghue's* case (1). I concur in the motion proposed.

LORD ROMER: My Lords, it must be conceded that, were it not for the change in the law effected by the Finance Act, 1926, s. 32, the appellants would have been entitled to deduct from their profits for the year ending Apr. 5, 1937, the aggregate of the wear and tear allowances which had been made to the strip company up to Aug. 22, 1930, for on this latter date the appellants succeeded to, and continued thereafter to carry on, the very same trade that up to then had been carried on by the strip company. The allowances would accordingly, by reason of the provisions of the Income Tax Act, 1918, Sched. D, Cases I and II, r. 6 (3), be added to the amount of the deduction for wear and tear for the year of assessment in question, and be deemed to be part of that deduction. Rule 11 of those rules would have had nothing to do with the matter. It was, in the first place, a rule which dealt only with changes and successions in the persons carrying on a continuous trade or profession occurring within the year of assessment or the period of average upon which the assessment had to be based. In the second place, the rule was solely concerned with the basis on which the profits or gains of the trade or profession were to be computed, where such a change had occurred, and was in no way concerned with what deductions could be made from those profits or gains in respect of allowances under r. 6. However, the new r. 11, substituted for the old one by the Finance Act, 1926, s. 32, is—so far, at any rate, as successions are concerned—in very different terms. It now deals with the tax payable for all years of assessment after the succession has taken place, and enacts (para. (2)) that it shall be computed as if the successor had set up or commenced the trade, profession or vocation at that time. The rule no longer seems merely to contemplate, as did the old one, a change in the ownership of a continuous trade, but seems to enact that tax shall be payable as though there had been a change in the trade itself. This was the construction put upon the rule by the Court of Appeal, and, in my opinion, it is the only possible construction. I am unable to attach any importance to the fact that in the proviso to para. (1) of the rule the word "new" occurs, and that it does not occur in para. (2). If the successor is to be treated for income-tax purposes as if he commenced the trade at the time of the succession, I am unable to see how the trade then commenced can, for those purposes, be regarded as being other than a A new trade. This being so, it is obvious that there can be no deductions allowed in respect of the trade carried on before the succession took place. Such trade has, for the purposes of taxation, to be treated as though it were a different trade altogether from the trade being carried on by the appellants.

B My Lords, as to the contention of the appellants based upon the Companies Act, 1929, ss. 153, 154, and the order of EVE, J., of Aug. 16, 1930, a contention which relates to the losses incurred by the steel company and the strip company as well as to the wear and tear allowances of the latter company, the decisions of LAWRENCE, J., and the Court of C Appeal rejecting such contention appear to me to be plainly right. The effect of the order of EVE, J., was that the appellants succeeded to the trades of the two companies within the meaning of r. 11 (2), but there is nothing in the two sections which can possibly be regarded as excluding the appellants' succession from the operation of that rule. It is true D that, by virtue of the sections and the order, the appellants succeeded to all the rights possessed by the two companies at the time of the succession, but they did not thereby obtain any right to deduct the losses and wear and tear allowances of the two companies from the profits they might subsequently earn by their own trading, for the two companies had not, E and obviously could not have had, any such right themselves. My Lords, I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Johnson, Weatherall, Sturt & Hardy* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

F [*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

McLEOD (OR HOUSTON) *v.* BUCHANAN.

G [HOUSE OF LORDS (Viscount Caldecote, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer), **January 24, 25, March 14, 1940.**]

H *Insurance—Motor insurance—Vehicle insured for commercial purposes only—Breach of statutory duty—Permitting use of uninsured motor vehicle—Use of commercial van for private purposes when insured for commercial use only—No evidence of owner's knowledge of such user or of his express permission to driver—Road Traffic Act,* 1930 (c. 43), *s.* 35 (1).

A woman whose son was fatally injured as a result of a motor accident obtained judgment for damages and costs against the negligent driver of the vehicle, but failed to recover anything under the judgment. She thereupon brought an action to recover the damages and costs from the owner of the vehicle, alleging that he was in breach of his duty under the Road Traffic Act, 1930, s. 35, in permitting the driver to use the vehicle when it was not insured against third-party risks, in the sense that it was not insured for private purposes when in fact it was being used for a private purpose, but was insured for commercial use only. There was no evidence that the owner knew that the driver was using the vehicle for a private purpose, or that he gave him express permission so to use it:—

Held: as the respondent permitted the use of the vehicle when it A
was not insured against third-party risks, contrary to the Road Traffic Act, 1930, s. 35, and thereby failed in his duty of insuring the vehicle, the appellant was entitled to recover damages from him.

[EDITORIAL NOTE. This case is of importance for two reasons. First, though the point does not seem to have been seriously contested, it is an approval by the House of Lords of the decision of the Court of Appeal in *Monk* v. *Warbey* (1). B
Secondly, the words "permit any other person to use a motor vehicle" have been the subject of two or three decisions recently in the lower courts, and the views of the House of Lords on the proper construction of these words must be very helpful.

As to Duty to Insure, see HALSBURY, Hailsham Edn., Vol. 18, pp. 561-563, paras. 908-912; and for Cases, see DIGEST, Supp., Insurance, Nos. 3217r-3217ee.] C

Case referred to:

(1) *Monk* v. *Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.

Appeal by the mother of the deceased from an interlocutor of the First Division of the Court of Session in Scotland, dated July 15, 1938. D
The facts and the arguments are fully set out in the opinion of Viscount Caldecote, L.C.

Thos. A. Gentles, K.C., and *Douglas A. Donald* (for *C. W. Graham Guest*, on war service) for the appellant.

G. R. Thomson, K.C., and *G. C. Cohen* (for *W. Clarke Reid*, on war E
service) for the respondent.

Viscount Caldecote, L.C.: My Lords, the appellant has had an unhappy experience in her quest for some compensation for the loss of her son, James Houston, who was killed on Nov. 30, 1933, by a motor F
car belonging to the respondent and driven by his brother, James Buchanan. The history of the prolonged litigation which the appellant has had to meet begins with her action against James Buchanan for damages in respect of the death of her son having been caused by James Buchanan's fault. She obtained a verdict for £750 damages, and was G
also found entitled to expenses amounting to £299 3*s.* 4*d.* Unfortunately, James Buchanan was unable to pay any part of these sums.

The appellant then took proceedings under the Road Traffic Act, 1934, s. 10, against the Royal Insurance Co., with whom the respondent was at the time of the accident insured, in respect of third-party liability H
arising out of the use of the car. She claimed the damages and expenses awarded to her in the action against James Buchanan. The insurance company met the claim by relying on a condition of the policy under the head "limitations as to use"—namely, "use in connection with the policyholder's business only"—whereas the driver, James Buchanan,

was using the car for his private purposes. The insurance company succeeded, and the appellant then began the present proceedings against the respondent for the recovery of the damages and expenses awarded to her by way of damages for the breach by the respondent of his statutory duty under the Road Traffic Act, 1930, s. 35. The action was at first dismissed as irrelevant. On appeal to the First Division, the interlocutor of LORD CARMONT was recalled and proof allowed. When the proof was taken, the Lord Ordinary, LORD JAMIESON, pronounced an interlocutor in favour of the respondent. The appellant once more appealed. The First Division of the Court of Session, consisting of four judges, heard the appeal and, as they were equally divided, a rehearing took place before a court of five judges. Finally an interlocutor was pronounced in favour of the respondent by a majority consisting of the Lord President, LORD FLEMING, and LORD PITMAN, LORD MONCRIEFF and LORD CARMONT dissenting. The appellant now comes to your Lordships' House. The only question now outstanding is as to the appellant's right to recover damages, the respondent by his counsel having taken the very reasonable course of admitting at the bar the amount of damages to be the two sums of £750 and £299 3*s*. 4*d*., if the appellant should be held entitled to succeed.

The Road Traffic Act, 1930, s. 35, upon which the appellant relies, imposed a duty on the respondent not "to use or to cause or permit any other person to use" his motor car unless there was in force in relation to the user of the vehicle by that other person a policy of insurance in respect of third-party risks complying with the requirements of the Act. Sect. 36 sets out the requirements of the Act in respect of policies. The material requirement is contained in sect. 36 (1) (*b*). The result of these provisions was to prohibit the respondent from causing or permitting James Buchanan to use the car in question unless a policy of insurance was in force covering third-party risks in respect of the death of, or bodily injury to, any person caused by, or arising out of, the use made of the car. Neither the respondent nor anyone else was insured in respect of the actual use which was being made of the car at the time of the accident. In these circumstances, the only question is, did the respondent use, or cause or permit James Buchanan to use, the car? As the answer depends on all the facts, it is necessary to state them in some detail.

The respondent is a member of a firm of solicitors in Glasgow. In 1932, he became tenant of Garrauld Farm, in order that his brother James Buchanan might carry on a poultry farm as manager for him. The respondent's intention was to allow his brother in the course of time to buy him out and to become the proprietor. The respondent took no part in the management of the farm, and James Buchanan had sole control. Garrauld Farm is about 4½ miles from the nearest village, and is 21 miles from Glasgow, and about 14 miles from Milngavie, where the respondent lived. James Buchanan thought the farm was isolated, and found it necessary to have the use of a motor vehicle in connection with the business. Accordingly, the respondent bought an old Humber touring car for a few pounds for his brother and for the use of the farm. It seems that the purchase was carried through by James Buchanan. The respondent did not see the car before it was bought, but he paid for it. It was registered in his brother's name, and a proposal form was signed by James Buchanan for a policy of insurance covering the car for 12 months from June 28, 1932, to June 28, 1933. James Buchanan did not remember filling in the details of the form, and it is probable that this was done by one of the clerks in the respondent's office. The form used was headed : "Proposal form for motor cars used for private purposes." In reply to a question, "Will the motor car be used solely for social, domestic and pleasure purposes?" the answer given was : "No." In reply to the next question, "If not, please state other uses," the answer was : "Also in connection with my poultry farm." In due course, the proposal was accepted, and a policy was issued in the name of James Buchanan containing the words "no use except for private purposes." However, by a definition of "private purposes," the use of the car by James Buchanan (described as "the insured") in connection with his business or profession was within the terms of the policy. The respondent did not personally interest himself in the matter of the insurance, and only became aware much later that the car was registered and insured in his brother's name. From time to time the respondent visited the farm, for the purpose of showing interest in his brother rather than in the farm. He said that he became aware that the car was used for every purpose, practically, for which a car could be used. As might be expected, the Humber car was not very reliable, and the respondent had bills to pay for repairs. For one reason or another, Mrs. Buchanan, the wife of James, was not satisfied with the Humber as their only car, and she bought a small Standard car for her own purposes. Up to the time of the purchase of the Standard, the Humber was freely used by Mr. and Mrs. James Buchanan for social as well as for business purposes. After the purchase of the Standard, James Buchanan used the Humber for his own private purposes, but not when his wife was with him. The evidence of the respondent, which was given with complete candour, satisfies me that the respondent knew quite well of the use of the Humber car for the private purposes of his brother, and raised no sort of objection. The respondent was not made aware of any difference in the use made of the Humber after the acquisition by Mrs. Buchanan of her own car.

James Buchanan grew tired of the Humber and its faults, and asked the respondent if he could get another vehicle. He wanted a Ford van, and the respondent authorised him to buy one. The van was bought in July, 1932, and the respondent paid the price. When the necessary steps for insurance were being taken, the respondent saw the registration book and noticed that the new car was registered in his

brother's name. He gave instructions to have that altered. The insurance proposal form was filled up and signed in the first instance as a proposal by James Buchanan. The form used was the same as in the case of the Humber car—namely, for a car used for "private purposes." The type of body was declared, in the handwriting of James Buchanan,
A to be "commercial van," and, in answer to the question as to the purposes for which the car would be used, the word "Commercial" was written in. Thereupon the insurance company required a fresh proposal to be made on a form "for commercial motor vehicles." This was duly filled in by the respondent's clerk and signed by the respondent, as proposer,
B described as "poultry farmer." A policy headed "commercial motor vehicle" was issued, containing in the schedule the words:

> Warranted used only for the following purposes: in connection with insured's business.

In the ordinary course, a certificate of insurance was sent to James
C Buchanan by the respondent's firm, containing a statement as to the use of the car being permitted only in connection with the policyholder's business. James Buchanan did not read the certificate. The respondent took no interest or part in the insurance of the car, except by affixing his signature. His clerk looked after insurance matters in his office.
D It is plain that the respondent never addressed his mind to the question of the use of the new car. What he would have said or done if he had given it any thought can only be a matter of surmise. He saw the van on occasions delivering eggs in Glasgow, but he said he had no knowledge as to what kind of use was being made of the van. His
E evidence was that he never gave his brother any permission to use the van, and did not know of his brother using it, for private purposes. Nor did he ever tell his brother that the insurance was restricted, or make any conditions as to the use of the Ford vehicle. In fact, James Buchanan used it, not only for the farm, but also occasionally to go
F down to the village for cigarettes, or for other purposes of his own. On the night of the accident, when he and his wife were going to a women's rural institute in the village, there was trouble with the self-starter of Mrs. Buchanan's car, and he took his wife and a friend in the Ford van to the meeting. He was on his way to pick them up again
G after the meeting when the accident took place as the result of which the appellant's son was killed.

My Lords, what inference is to be drawn from these facts? The Lord Ordinary, Lord Jamieson, thought that the respondent had no ground even for suspicion that the van, which was not adapted
H for use as a pleasure car, might be used for any other purpose than in connection with the farm. I should be slow to differ on a question of fact from the judge who saw and heard the witnesses, if any facts were in dispute, but this finding appears to me to overlook the undisputed facts with regard to the use of the Humber car. The explanation of the respondent's conduct is perhaps to be found in his detachment. He

showed a generous and trusting disposition towards his brother. He tacitly allowed the Humber car to be used for private purposes, and, when the new van replaced the old touring car, he made no new condition. He left his brother to carry on, without any express, or even implied, restrictions upon the use of the new car. The Lord President attached importance to the fact that, if James Buchanan had read the certificate A of insurance of the Ford van when he received the certificate, he would have been put on inquiry. It was said by the Lord President that the respondent might reasonably assume that James Buchanan would read the certificate. LORD FLEMING suggested that James Buchanan was under a duty to see that the insurance covered the purposes for which B a car under his charge was used, and that the respondent was entitled to rely on his brother. I cannot help feeling that these opinions do not really bear upon the question which your Lordships have to determine. It is not in dispute that there was no policy of insurance in force covering the use of the Ford van for private purposes. Did the C respondent in these circumstances permit his brother to use the Ford van for private purposes? I think that the right answer was given to this question by LORD CARMONT, who was of opinion that the handing over of the complete control of the vehicle to James Buchanan was unambiguous, and had the effect of sanctioning general use. The D respondent never at any time suggested that he had the intention to restrict the user of either of the cars, and, as to the first car, he knew that in fact it was used without restriction. On these undisputed facts, I have come to the conclusion that the respondent permitted the use of the Ford van by his brother for purposes not covered by any insurance. E In my opinion, the appellant is entitled to recover the damages, which have been agreed at the sum of the two amounts of £750 and £299 3*s*. 4*d*. Accordingly, I move that this appeal be allowed, that the interlocutors appealed against should be recalled and that the appellant should be granted a decree for this amount, as also for such costs of this appeal as F are usual in pauper cases, and for her expenses in the Court of Session, so far as not already dealt with by the interlocutors dated Feb. 24, 1937, and June 18, 1937, respectively.

My Lords, my noble and learned friend LORD THANKERTON desires me to say that he concurs in the opinion which I have just read. G

LORD RUSSELL OF KILLOWEN [read by LORD ROMER]: My Lords, a perusal and consideration of the evidence in the case establish as against the respondent the following facts—(i) that from about June, 1932, down to the purchase of the Ford van, the farm vehicle (i.e. the H vehicle which formed part of the farm assets, and which belonged to the respondent as owner of the farm) was the Humber car; (ii) that the insurance covered its user for both business and private purposes; (iii) that it was, to the knowledge of the respondent, used by James Buchanan for both business and private purposes, as well after as before

Mrs. James Buchanan had bought her own Standard car; (iv) that the Ford van was bought to take the place of the Humber car, which had broken down; (v) that the insurance company was asked to cover temporarily, and did cover temporarily, the van in substitution for the Humber car under the existing policy; (vi) that the only proposed A alteration in the new insurance of which James Buchanan was specifically informed by the respondent was that the new policy was to be in his name, and not, as was the case with the Humber policy, in the name of James Buchanan; and (vii) that the respondent's firm on Aug. 3, 1933, forwarded to James Buchanan a certificate of insurance which B had been sent to them by the insurance company, and which stated, *inter alia*, that the insurance was limited to the use of the vehicle "in connection with the policyholder's business only."

The question in this case is whether the respondent permitted James Buchanan to use the Ford van on a road without there being in force C in relation to the user of the Ford van by James Buchanan the requisite policy of insurance in respect of third-party risks. But for the forwarding of the certificate to James Buchanan, the answer must, in my opinion, be clearly "Yes." On the facts of this case, James Buchanan was entitled to assume, unless told otherwise, that the new farm vehicle D took the place of, and was substituted for, the old farm vehicle for all purposes. In other words, he was entitled to assume that the permission to use the farm vehicle for private purposes continued, unless and until withdrawn. Indeed, the isolated position of the farm, 4 or 5 miles distant from the nearest village, and the meagre public means of trans- E port available, made such permission almost, if not absolutely, a necessity for whoever acted as resident manager for the respondent. If this was the case, as, in my opinion, it was, then the respondent must, or ought to, have known that, unless James Buchanan was told that the Ford van must not be used for private purposes, he would continue the F old Humber practice, and would use the Ford van for those purposes. In those circumstances, if and when James Buchanan used the Ford van for private purposes, the respondent would be permitting that user within the meaning of the Road Traffic Act, 1930, s. 35 (1).

The question then remains whether the sending of the certificate can G operate as a withdrawal by the respondent of the old permission, or a prohibition by the respondent of the user of the Ford van for non-business purposes. In my opinion, it cannot operate as either. It was not sent by the respondent, or on his instructions. It does not purport to come from the respondent individually, nor does the accompanying H letter purport to be a communication from the farm owner to his manager. It comes from the solicitor's office as a matter of routine—namely, the sending to the driver of the vehicle of the certificate which the statute requires, and which is normally kept in the car with the driver's licence. In fact, James Buchanan treated it as a matter of routine. He never read the certificate, but simply placed it at once inside his driving licence.

He did not know that it referred to any limitation of user. My Lords, in these circumstances, I am of opinion that the respondent committed a breach of the section in question, and that the appeal should be allowed.

Lord Wright: My Lords, I agree with the opinion which has been delivered by my noble and learned friend Viscount Caldecote, A L.C., and do no more than state very briefly my reasons for differing from the judgment appealed from.

The courts below proceeded on the footing that the construction and effect of the Road Traffic Act, 1930, s. 35, were as stated by the Court of Appeal in *Monk* v. *Warbey* (1). This was rightly not questioned B before your Lordships. Sect. 35 of the Act, while in express terms merely creating a criminal offence, punishable by the penalties stated in the Act, does also by implication, on principles well settled and now familiar in the case of offences under similar statutes, create a civil liability in favour of any one of the class of persons whom the statute C is intended to protect when such person is injured by reason of a breach of the statutory duty or obligation. The class of persons whom the section is intended to protect includes those who are likely to be injured by the negligent user of the vehicle—that is, *prima facie* and generally, persons using the highway. The appellant's son, who was killed by D James Buchanan's negligence in driving the van, clearly falls within that class. The particular mischief which the section is aimed at averting is the danger that the user of the wrongdoing vehicle (if I may call it so) is not covered against third-party risks, so that the injured person has not the right, which he would have had if there had been E an insurance, of recourse against the insurers under the Claims against Insurers Act, 1930, if the wrongdoer cannot personally answer in damages. The provision is an important element in the policy of the legislature to secure the benefit of insurance for sufferers from road accidents. Sect. 35 accordingly provides that it is an unlawful act for F any person to use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person such an insurance against third-party risks as the Act requires. The section is imperative, and precisely specifies the act or default constituting the offence, which is sufficiently established G by proof of the matters specified. Intention to commit a breach of the statute need not be shown. The breach in fact is enough. In the present case, the van was not insured as the section required while it was being driven by James Buchanan at the time when the appellant's son was killed. The actual policy only covered user for commercial H purposes on the business of the farm, whereas at the moment of the accident James Buchanan was using it for private purposes. He was, accordingly, at least *prima facie*, guilty of a breach of the section. The question is, however, whether the respondent also committed a breach of the section.

It is clear that the respondent did not "cause" his brother to use the van on the road as the brother was doing. To "cause" the user involves some express or positive mandate from the person "causing" to the other person, or some authority from the former to the latter, arising in the circumstances of the case. To "permit" is a looser and vaguer term. It may denote an express permission, general or particular, as distinguished from a mandate. The other person is not told to use the vehicle in the particular way, but he is told that he may do so if he desires. However, the word also includes cases in which permission is merely inferred. If the other person is given the control of the vehicle, permission may be inferred if the vehicle is left at the other person's disposal in such circumstances as to carry with it a reasonable implication of a discretion or liberty to use it in the manner in which it was used. In order to prove permission, it is not necessary to show knowledge of similar user in the past, or actual notice that the vehicle might be, or was likely to be, so used, or that the accused was guilty of a reckless disregard of the probabilities of the case, or a wilful closing of his eyes. He may not have thought at all of his duties under the section. The Lord President in his judgment stated that both parties before the First Division expressly accepted as the test for the present case:

> . . . did the defender know or ought he to have known that the van was being or was likely to be used by his brother for his own private purposes?

This, so far as it goes, is a compendious and practical way of stating the crucial question. If the answer is in the affirmative, a case of permission is made out. However, Lord Carmont, in his dissenting judgment, with which in substance I agree, has stated the effect of sect. 35 with a rather different emphasis, and in more general terms:

> I think that anyone who parts with the control of a motor vehicle completely, without making any definite arrangement with the custodian as to use, impliedly permits all uses, and it is for the permitter to see that there is the requisite insurance cover in force in relation to a use which is in fact unrestricted.

It is not necessary in the present case to consider whether sect. 35 justifies a statement so unqualified, and whether, for instance, it covers cases where the custodian has used the vehicle in a manner outside what any reasonable person could have contemplated. To impose this unqualified obligation on a person who parts with the control of a vehicle without any definite arrangement as to its use might promote the general policy of securing that all vehicles should be insured, but I question whether the parting with control without definite express restriction gives a permission within the meaning of the section for unrestricted user. A definite arrangement could be shown without express words, by an implication from the circumstances. The statement of Lord Carmont, however, has the effect of putting on the person who parts with the control of the vehicle the onus of showing that the user, *prima facie* unrestricted, was in fact limited. This may, for practical purposes, come to the same thing as the mere test of what user is likely, which is sufficient for the present case. It must also be remembered that, as the section is dealing with a criminal offence, the onus is on the prosecution to prove the case.

In the present case, however, I think that the permission is established. In my opinion, the evidence shows that the control of the vehicle was handed over to James Buchanan for the same user as the Humber car had been handed over to him—namely, for the purposes of the commercial business of the farm, and for such reasonable personal use as was natural and usual where the farm was as remote or solitary as the farm in question. This position was not changed, as regards the Humber, by the acquisition of Mrs. James Buchanan's car. Her husband might want to go out by himself, or her car might be out of order. James Buchanan was never informed in any way that the terms of the insurance had been altered, or that he was not to use the van for private purposes. The substitution in the policy of the respondent's name for that of his brother, of which the brother was aware, did not give that information. The van was perfectly suitable for James to drive by himself, or even to take his wife and friends. The sending of the insurance certificate without any further intimation was not sufficient notice to him of the change. He did not in fact read it. There was in truth no certainty or likelihood that he would. In my opinion, the necessary permission is established, with the result that the appeal should be allowed.

LORD ROMER: My Lords, I have had the privilege of reading beforehand the opinion of my noble and learned friend VISCOUNT CALDECOTE, L.C. I agree with it entirely, and concur in the motion which has been proposed.

Appeal allowed.

Solicitors: *J. K. Edmondson & Co.*, agents for *W. G. Manson & Co., W.S.*, Edinburgh, and *Turner MacFarlane & Co.*, Glasgow (for the appellant); *John Kennedy & Co.*, agents for *Macpherson & Mackay, W.S.*, Edinburgh, and *McGrigor, Donald & Co.*, Glasgow (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

GRAUMANN *v.* TREITEL.

[KING'S BENCH DIVISION (Atkinson, J.), **February 14, 15, 16, 19, March 1, 1940.**]

Money—Rate of exchange—Liquidated demand—Debt in marks payable in Germany—Whether action in debt or for breach of contract—Rate of exchange prevailing when payment should have been made.

The parties carried on business in partnership in Berlin, with a branch in London registered as a limited company under English law. At the end of 1937, the partnership was dissolved, and thereafter the business in Berlin was carried on by the defendant. The taking of accounts between the partners showed a sum due to the plaintiff, payable in marks on Sept. 30, 1938, in Berlin. In June, 1938, the defendant left Germany and emigrated to England, both the parties being then resident in London. The partnership agreement was to be performed in Germany, and, by the currency law of that country, it was illegal to make the payment due there on Sept. 30, 1938, because the plaintiff was then a non-resident. On behalf of the defendant, it was contended that an action would not lie in an English court to recover a debt payable in a foreign country in the currency of that country, the proper form of action being one for damages for breach of contract to pay German marks, and that there had been no breach of contract, because, by German law, no payment could legally be made to the plaintiff in Berlin, he having become a "currency foreigner." It was found as a fact that there was nothing in German law to prevent a German subject resident outside Germany from paying a debt due to another German also outside Germany:—

HELD: (i) a claim to recover a sum payable in a foreign currency in a foreign country is a claim in debt and not one for breach of contract.

(ii) the plaintiff was entitled to payment of the sum claimed in sterling, at the legal rate of exchange prevailing at the date when the payment should have been made.

[**EDITORIAL NOTE.** It has been generally assumed for some time that, in the case of a liquidated demand expressed in foreign currency, the conversion has to be made at the rate prevailing on the date the debt became due. A detailed examination of the authorities, however, shows that the point is not free from doubt. The matter is fully explored in the judgment herein and decided in favour of the accepted view. The judgment is also of importance as a review of the effect of the recent currency legislation in Germany.

AS TO RATE OF EXCHANGE, see HALSBURY, Hailsham Edn., Vol. **23**, pp. 173, 174, para. 251; and FOR CASES, see DIGEST, Vol. 35, pp. 173-176, Nos. 38-63.]

Cases referred to:

(1) *Lloyd Royal Belge Société Anonyme* v. *Dreyfus (Louis) & Co.* (1927), 27 Lloyd, L.R. 288.

(2) *Celia (S.S.)* v. *Volturno (S.S.)*, [1921] 2 A.C. 544; 17 Digest 159, *602*; 90 L.J.P. 385; 126 L.T. 1; *affg.* S.C. *sub nom. The Volturno*, [1920] P. 447, 454, n.

(3) *Di Ferdinando* v. *Simon, Smits & Co.*, [1920] 3 K.B. 409; 17 Digest 159, *604*; 89 L.J.K.B. 1039; 124 L.T. 117.

(4) *Richardson* v. *Richardson*, [1927] P. 228; Digest Supp.; 96 L.J.P. 125; 137 L.T. 492.

(5) *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451; 17 Digest 79, *8*; 91 L.J.K.B. 288; 126 L.T. 513.

(6) *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim*, [1922] 2 Ch. 589; 17 Digest 160, *609*; 91 L.J.Ch. 765; 127 L.T. 284.

(7) *Joachimson* v. *Swiss Bank Corpn.*, [1921] 3 K.B. 110; 21 Digest 639, *2188*; 90 L.J.K.B. 973; 125 L.T. 338.

(8) *Uliendahl* v. *Pankhurst, Wright & Co.* (1923), 39 T.L.R. 628; 17 Digest 160, *611*.

(9) *Peyrae* v. *Wilkinson*, [1924] 2 K.B. 166; Digest Supp.; 93 L.J.K.B. 121; 130 L.T. 511.

(10) *Vionnet (Madeleine) et Cie.* v. *Wills*, [1939] 4 All E.R. 136; Digest Supp.; 161 L.T. 311.

(11) *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Creditbank*, [1939] 2 K.B. 678; [1939] 2 All E.R. 782; Digest Supp.; 108 L.J.K.B. 861; 160 L.T. 615; *affd.*, [1939] 3 All E.R. 38.

(12) *De Beéche* v. *South American Stores, Ltd., and Chilian Stores, Ltd.*, [1935] A.C. 148; Digest Supp.; 104 L.J.K.B. 101; 152 L.T. 309.

(13) *Lady Duncannon* (*Owners*) v. *Eisenach* (*Owners*), *Simson & Goliath* (*Owners*) v. *Eisenach* (*Owners*), [1936] 1 All E.R. 855; Digest Supp.; *sub nom. The Eisenach*, 155 L.T. 442.

Action claiming £6,799 6*s*. 3*d*., the sterling equivalent of RM. 78,435·50 A payable in Berlin on Sept. 30, 1938, at the official rate of exchange on the due date, with interest. The facts are fully stated in the judgment.

A. Aiken Watson for the plaintiff.

Cyril T. Miller for the defendant.

Watson: It is clear that the contract may be sued on in this country. B An English court can only give judgment in sterling. As to the rate of exchange, there is only one rate of exchange, and that is such a rate as will enable the debtor in England to acquire credit in Germany to the extent of his indebtedness. The mere fact that the English debtor can possess himself of marks in London at a low rate of exchange should C not be recognised in this court. Such marks could not be used in Germany for any purpose without a breach of German currency laws, and, by the comity of nations, this court will not countenance such a breach. In any event, such marks would not, on the evidence of the defendant's own expert witnesses, be a good discharge in German law D of an obligation to pay money in Germany. [Counsel referred to *Vionnet* (*Madeleine*) *et Cie.* v. *Wills* (10), *Peyrae* v. *Wilkinson* (9) and *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Creditbank* (11).]

Miller: This is a German agreement to pay in Germany. The parties E have now become currency foreigners under German law, but the claim must be determined by that law, so far as the obligation is concerned. The only way in which performance could be made in Germany would be by payment into a blocked account by permission of the authorities, if the creditor agreed to accept it in full satisfaction. The plaintiff F refused to give a declaration to that effect, as is required by German law. There has been no breach of an agreement to pay German marks in Germany. The debtor has done all he could do. It is impossible to fulfil an obligation to pay German marks in England. It cannot be that the obligation is to pay sterling. Once the defendant has tendered G marks in Germany, the plaintiff cannot ask that a substituted performance should be made here. There has been no breach in Germany. The claim here, if at all, is for damages for breach of contract in Germany. The ascertainment of the rate of exchange is not the proper way of assessing the damages. If the payment tendered had been accepted, H the marks could have been bought in London much more cheaply. [Counsel referred to *De Beéche* v. *South American Stores, Ltd., and Chilean Stores, Ltd.* (12), *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Creditbank* (11) and *Lady Duncannon* (*Owners*) v. *Eisenach* (*Owners*) (13).]

Watson, in reply: It is immaterial whether the form of the claim is for the debt or for damages for breach of contract by non-payment on the due date. If the form is for damages, those damages must be assessed at the date of the breach, which was the due date of the debt.

ATKINSON, J.: This case arises in this way. On Mar. 31, 1933, there was a partnership agreement between the defendant and one Meyer and the plaintiff. They became partners in a German business under the name of Treitel & Meyer, the business being that of manufacturing ladies' gowns. Meyer left the firm at the end of 1936, and the business was then carried on by Treitel and Graumann. On June 12, 1937, a fresh partnership agreement was signed, under which they were to carry on together until, in any event, Dec. 31, 1937, and were to carry on for another 3 years unless notice of termination was given. The plaintiff's interest in the capital of that concern amounted to 35 per cent.

In 1934, the firm had registered a company in London for carrying on a similar business, and I accept Graumann's evidence that the object of that was, as he put it, to form a sort of nest-egg in London, so that, when, as they expected might well happen, Jews were more or less compelled to leave Germany, there should be a business for them to retire to in London. No fresh capital was brought into the concern, but capital was provided by exporting from Germany goods to the value of some £2,000, and in that way the English company acquired its capital. When Meyer retired, he retired from all interests in both concerns, and in 1937 the plaintiff and the defendant were the only people interested in these two concerns.

Notice to terminate the partnership was given by the defendant, and the partnership ended at the end of 1937. On Jan. 1, 1938, the plaintiff was appointed sales manager of Treitel & Meyer, Ltd., the London concern, until June 15, 1938. In the meantime, the value of his interest in the two concerns was being ascertained, and, this having been ascertained, on June 18 an agreement was signed between the parties providing for the payment out of his capital to the plaintiff. I must just run through that agreement. It is dated June 18, 1938, and it is an agreement between Hans Treitel of Berlin, of the one part, and Julius Graumann of Berlin, of the other part:

> Messrs. Treitel and Graumann were the sole proprietors of the partnership carried on under the firm of Treitel & Meyer. Mr. Graumann left the partnership on Dec. 31, 1937, and has already made the necessary documentary statements. . . .

Then Graumann leaves the business and all assets to Treitel, and the agreement continues as follows:

> Mr. Graumann receives (*a*) the amount of his capital account amounting to approximately RM. 108,000 as may be seen from the balance sheet drawn up; (*b*) a single indemnity amounting to RM. 80,000. Of the amount due to Mr. Graumann a part amounting to RM. 50,000 has been paid at the end of Mar., 1938; the balance is payable as to RM. 60,000 on the last day of June, 1938, and

> as to the remainder on the last day of Sept., 1938. For every payment 10 days of grace are granted. . . .

Then there is a provision for interest at the rate of 4 per cent. This action is an action to recover the last of those payments due on Sept. 30, 1938, and there is no dispute about the amount. I should just add that, by an agreement dated Nov. 27, 1938, Treitel sold the German business A to one Paul Doerr, who had been in the employ of the firm.

The defendant left Berlin for good on June 22, 1938. The plaintiff had been in London throughout 1938. He went over to Berlin for the signing of this agreement, and returned to England on June 19. On July 3, he was in Berlin for two days, and on July 10 for three days. B Apart from that, he has not been back to Berlin. In the result, the amount was not paid, and the plaintiff sues for it.

English courts have never had any difficulty in assuming jurisdiction in actions *in personam* where the defendant is in England, although the cause of action arose in some other country. In DICEY'S CONFLICT C OF LAWS, 5th Edn., p. 228, r. 59, it is stated as follows:

> When the defendant in an action *in personam* is, at the time of the service of the writ, in England, the court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises.

Then among the illustrations given one finds these, at p. 234: D

> X incurs a debt to A in France. A brings an action against X for the debt. The court has jurisdiction to entertain the action. X a Frenchman makes a contract in France with A for the delivery of goods by X to A in Paris. A brings an action against X for not delivering the goods. The court has jurisdiction.

There are other cases, to which I shall have to refer later on, which make E it quite clear that, generally speaking, the mere fact that this was a contract to pay a debt in a foreign currency in a foreign country creates no difficulty whatever about the defendant being sued, if he is in this country at the time when he is served with the writ. One further principle could be invoked, and that is set out as follows in DICEY'S F CONFLICT OF LAWS, 5th Edn., p. 246:

> The court has jurisdiction whenever any relief is sought against any person domiciled or ordinarily resident in England.

There is no doubt that the defendant is domiciled in this country, because, when he left Germany, what he did was to come here and G carry on the limited company of Treitel & Meyer, Ltd.

Is there any reason why the ordinary rule should not apply? Counsel for the defendant says that there are two very good reasons why that ordinary procedure cannot apply. The first one is that the contract was one to be performed in Berlin, and in Berlin only, and H that payment there was unlawful. The second one is that it is not true to say that an action for debt can be brought in this country to recover a sum payable in another country in a foreign currency, that the true view is that only an action for damages for breach of contract can be brought, and that there was no breach of contract in Berlin, because payment could not lawfully be made there. Therefore, he says, the plaintiff cannot succeed in this action.

In order to appreciate the points, it is necessary to refer to the German currency regulations. The main object of those regulations, of course, A is to prevent German marks from leaving the country, and, indeed, to prevent them from coming into the country except under the control of the *Devisenstelle*, which I gather is some financial authority created by the German government. I have been supplied with a copy of the relevant provisions, and, for the purpose of these regulations, German B nationals are divided into two classes. They are either currency inlanders or currency foreigners. Broadly speaking, a currency inlander is a German who is living in Germany or carrying on business out of Germany, with the consent of the authorities, whereas a currency foreigner is a German who is living out of the country or carrying on C business out of the country without the permission and consent of the authorities.

At the time when this agreement was entered into, both the parties were currency inlanders—the defendant because he lived in Berlin, and was domiciled there and carried on business there, and the plaintiff D because he was carrying on their branch in London with the consent of the authorities.

The difficulty which arises under the various regulations is that, whereas there is perfect freedom as to payment of debts by one inlander to another, there is only one way in which a debt to a currency foreigner E can be discharged according to German law, and that way is this. The money has to be paid into a government-controlled bank to the credit of a blocked account of the creditor. A blocked account means an account upon which the creditor cannot draw at will. He can use it only with the consent of the authorities, and, if he wants to take the F money out of the country, the only way in which he can do so is to sell that credit to some government-controlled bank in Germany. The price he gets for it varies slightly, but is in general somewhere about 6 per cent. of the amount. From the point of view of the currency foreigner, therefore, payment into a blocked account is a very unsatis- G factory way of discharging his debt, and even that can be done only with the consent of the *Devisenstelle*, and that consent will be given only if the creditor signs a declaration that he is willing to accept payment in that way in full discharge of his debt.

There has been a very interesting decision upon the effect of this H legislation by the Supreme Court in Germany called the Great Senate for Civil Matters. I do not quite know how cases get to the Great Senate, but I gather that, if there is a difference of opinion between the minor courts, or if there is an appeal from one of the minor courts on some point of law, it goes to this Great Senate, on which, I gather, most of the judges sit together, and answer in a binding way the points submitted to them. The point submitted to them for the purpose of this case was that the plaintiff, who had a domicil in Amsterdam, had lent money to some German inlanders and wanted the money back. The defendants had offered payment in the only legal way—namely, into a blocked account. The plaintiff had refused to take it in that way. She had refused to agree, and had refused to sign the necessary declaration, that she would take the money in discharge of her debt. The question was whether or not the defendant was thereby discharged, and, in any case, what the position was. The court held that a currency foreigner was not bound to take payment in that way, but that, if he refused, the only result was that the debt was in suspense, and that the debtor must wait until the creditor was ready to take payment in that way, or until there was a change of circumstances permitting payment to be made in some other way. Perhaps the most interesting part of the judgment is the passage where the court indicates that a debtor could quite lawfully:

> . . . execute his performance if he, too, would have his domicil abroad, or if creditor and debtor would have their domicils in the inland. The hindrance lies with the fact that the German foreign currency legislation, in the event of the creditor having his domicil abroad, the debtor his domicil in the inland, prohibits the debtor from executing his performance by interference of supreme authority. The cause of hindrance rests, therefore, predominantly with the debtor, and not with the creditor.

What they are pointing out there is that the whole difficulty arises because the debtor is in the country, and an inlander, while the creditor is a foreigner, and out of the country. If the position changes, however, and the debtor also changes his domicil and goes abroad, then he can lawfully execute the performance of his contract. On the other hand, if the creditor became an inlander, then they would both be inlanders, and again the debt could be paid. Until one of those events happened, or there was a change in the law, then payment could be made in that one way only.

All this might be very relevant to this case if the defendant had continued to be an inlander, but it is conceded that the defendant ceased to be an inlander within a week or two of June 22, 1938. He left Germany for good on that date, and, in the case of a Jew, the presumption arose almost at once, I am told, that he meant to leave for good. Apparently the authorities gave him credit for a certain amount of intelligence, and therefore presumed that, once he got out of Germany and the conditions in which he was then living, he would take very good care not to come back again. It is common ground that within a few days of June 22 he became a currency foreigner. The plaintiff made up his mind early in September to acquire an English domicil, and well before the end of September he became a currency foreigner. Therefore, by the due date for payment of this debt, both parties had passed out of German currency law altogether, except as to the property of Treitel which remained in Germany, and which was very soon under contract of sale to Paul Doerr.

There is no doubt that, once they both became currency foreigners, there were no currency restrictions which prevented Treitel from paying his debt. That was also the effect of the decision to which I have just referred.

Then what becomes of this point of illegality? It is perfectly true
A that the courts here will not enforce a contract if the performance here would be unlawful by the law of the country where it was to be performed. Here payment is not unlawful by any German law and there is no difficulty of that kind in the way of this court enforcing the contract. It seems to me, therefore, that the first point taken fails.

B The second contention involves two propositions. First, it is said that an action for debt cannot lie to recover a sum payable in a foreign currency in a foreign country, and that the only remedy is an action for damages for breach of contract. The second proposition involved is that the contract was one for payment in German marks,
C and in German marks only, in Berlin, and in Berlin only, and that, as payment there could not be made, because the plaintiff would not accept payment into a blocked account, therefore there had been no breach of contract in Berlin, and that, there being no breach of contract in Berlin, the plaintiff could not sue here for damages for breach.

D I have given a good deal of thought to that contention, but it seems to me that it must fail for several reasons. It is quite true that the debt was expressed in a foreign currency, but Dr. Loewenfeld and Dr. Lachmann both took the view that, for all that, it was merely a debt expressed in a foreign currency. They said that German law recognises
E a distinction between a debt expressed in one currency and a debt where payment in a particular currency is expressly stipulated. That view they based on para. 244 of a decree, which was translated in this way:

> If a money debt expressed in a foreign currency is payable within Germany, payment may be made in the currency of the empire unless payment in the foreign currency is expressly stipulated for.
F

There, it is said, is a clear recognition of the difference between a debt expressed in a foreign currency and a debt which, by the terms of the agreement, is expressly stipulated to be paid in only one currency. They also point out that there is nothing in this agreement which provides
G for performance in Germany or in Berlin only. They say that there is nothing there making it obligatory to pay in Germany or in Berlin only. There is nothing to limit the place of payment at all, although para. 269 of the German code provides as follows:

> If the place of performance is neither determined nor to be inferred from the
H circumstances . . . the performance has to take place where the debtor was domiciled at the time when the relationship creating the obligation arose.

By para. 270, it is provided that, if there is no contractual provision to the contrary:

> . . . the debtor has to transmit money at his cost and risk to the creditor at the latter's domicil. . . . If, in consequence of a change of domicil or place of business

> occurring after the relationship creating the obligation has come into existence, the costs or the risk of the transmission is increased, the creditor has to bear the increase of the costs in the former case and the risk in the latter.

It is not as if the contract provided in express terms for payment in one place, and in one place only, and, in any event, the obligation is to send the money to the creditor. The creditor was in London at the time. He had gone over to Berlin only to sign the document. He had been in London for some considerable time. He was going back the next day, and payment would normally have to be made to him there. Indeed, Dr. Loewenfeld put it in this way. The primary obligation rested on Treitel to pay the debt. *Prima facie*, it was payable in Berlin, but, if he and his creditor were in London at the due date of payment, the obligation remained, and could be enforced there. I think that that is a proper summary of his view, and, if his evidence differs from that of Dr. Wolff, I prefer it. However, I do not think that it does, because in cross-examination Dr. Wolff would not go so far as to express the view that, when they are both in London together, even if the primary place of discharge was Berlin, performance cannot be sought here.

Then comes a much more interesting point—namely, is the action one for damages for breach of contract or for debt ? Counsel for the defendant relied upon *Lloyd Royal Belge Société Anonyme* v. *Dreyfus* (*Louis*) *& Co.* (1). I need not touble with the facts in that case. There was a dispute between Louis Dreyfus & Co. and the plaintiffs, and there were cross-claims, which resulted in an agreement made during some litigation in France, under which a certain sum in francs was payable by Louis Dreyfus & Co. to the plaintiffs, and an action was brought here for that money. I think that the contention was that the agreement had not been kept by the other side, and that the rights were greater than those appearing in the agreement, but ROCHE, J., held that they were bound by the agreement. They could only enforce the agreement, and he treated it as a claim for debt, and gave judgment for the amount claimed, the rate of exchange to be calculated at the date of payment. He based his view as to that upon various decisions, to which I will refer in a moment, which were cases dealing with debt, and with nothing else. In giving judgment in the Court of Appeal on that point, BANKES, L.J., said, at p. 291 :

> In an action brought in England, as this is, the only cause of action, when once you accept the agreement, is an agreement to pay fr. 18,000 ; and if you bring that action in England it seems to me to follow that that must be an action for damages for breach of an agreement to pay fr. 18,000, because you cannot bring an action in debt in England for francs, and there is no law or practice or anything else which entitles you to change the nature of your cause of action by a calculation on the back of the writ in which you say : " My claim is fr. 18,000, and I convert it at such-and-such a rate of exchange into sterling, and I claim that sterling as a debt," because the agreement was to pay so many francs. That being so, I think that the cause of action must be, technically speaking, a cause of action for damages for failure to pay that amount of francs.

In the same case, SCRUTTON, L.J., was very guarded about it, and he certainly did not express any assent to that view In giving judgment, he said, at p. 293:

> I think there is no doubt that as far as actions for breach of contract or for tort for damages are concerned, the case of *The Volturno* (2), which was tort, approving the case of *Di Ferdinando* v. *Simon, Smits & Co.* (3), which was contract, has settled that you will take the exchange at the date of breach; and I am not at all sure A that in actions for debt it will not always turn out that it is damages for non-payment of money at the agreed time. But I do not think it is necessary to give a final judgment upon that point.

In his judgment, ROMER, J., was as positive about it as BANKES, L.J., and said, at p. 294:

> In no other way that I can see, except by bringing an action for specific per- B formance, could the plaintiffs claim, by action in this country, payment of the fr. 18,000; all that they could claim would be damages for failure to deliver that commodity.

The report of that case does not refer to the argument of counsel, nor does it state how far the numerous authorities to the contrary were brought C to the notice of the court.

That case has been followed once in the Probate Division by HILL, J., in *Richardson* v. *Richardson* (4), in which, referring to that case, HILL, J., said, at p. 234:

> The Court of Appeal has made it clear that the cause of action upon refusal to pay in a foreign currency is for damages and not for debt.

D The difficulty is that there is a long line of authorities which make it quite clear that actions for debt do lie in this country. A number of them are referred to in the illustrations in DICEY'S CONFLICT OF LAWS, but I need only begin for my purpose with *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* (5), where the defendant in 1914 contracted E in France a debt to the plaintiffs, a French hotel company, of some fr. 18,000. She was sued in this country for the money, and the question was whether the debt had been discharged by a certain payment in francs. However, nobody had any doubt in that case, or expressed F any doubt, as to whether or not the action for debt would lie. The only point was whether the debt had been paid, and the Court of Appeal decided that it had. In the course of his judgment, ATKIN, L.J., said, at p. 463:

> Inasmuch as the obligation to pay to the plaintiffs in France Frs. 18,035 was a personal obligation, the plaintiffs would also have been entitled to sue the defendant G in the courts of any country where they found her, provided that the municipal law of such country recognized personal obligation contracted outside its own territory, as would be the case in most states. The plaintiffs, therefore, have the right to sue the defendant in the English courts to recover the debt of Frs. 18,035 due to them in France. Judgment would only be given in the English courts expressed in English currency. At what date the exchange must be calculated is a matter of controversy that I need not deal with now.

H That is one decision. In the same year, the point was dealt with by P. O. LAWRENCE, J., in *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim* (6) in the Chancery Division. In that case, the bankers were claiming the right to prove for an overdraft. P. O. LAWRENCE, J., said, at p. 593:

> From the facts I have stated it will have been gathered that the claim of the

> applicants is simply one by bankers against their customer in respect of an overdraft. The relationship between banker and customer has recently been fully explained by the Court of Appeal in the case of *Joachimson* v. *Swiss Bank Corpn.* (7). Applying the principles there laid down the claim of the applicants is for a debt which became due from the bank to the applicants in Brussels in Belgian currency on Jan. 10, 1921.

Then P. O. Lawrence, J., proceeded to deal with the question as to the date on which the rate of exchange should be calculated, and he treated it as a claim for debt, and as a claim for debt only.

The same point arose before Rowlatt, J., in 1923 in *Uliendahl* v. *Pankhurst, Wright & Co.* (8). The headnote is as follows:

> In an action for the price of goods sold and delivered, where the price is payable in a foreign currency, the rate of exchange to be taken is that prevailing at the date when the debt became due...

A large number of cases had been cited to the judge as to the proper date, and in his judgment he is reported as having said, at p. 629:

> In actual practice the theory that the rate of exchange prevailing at the date of the judgment was that which must be taken would lead to great inconvenience. Clearly it was not so in a case of tort or of damages for breach of contract, and he did not see why it should be so in a case of debt.

There Rowlatt, J., treated it as a debt, and gave judgment for the debt claimed.

In *Peyrae* v. *Wilkinson* (9), an action tried by Bailhache, J., the judge was dealing with a claim for some fr. 10,000 payable in Lyons. He treated it as a claim for debt, and gave judgment accordingly. He said, at p. 167:

> With regard to the date at which the rate of exchange ought to be taken it is clear that in actions for damages for breach of contract the rate of exchange current at the date of the breach has to be taken in calculating the damages payable in English currency, but Mr. Monckton has put forward an ingenious argument—namely, that in an action for debt for goods sold and delivered the rate of exchange current at the date of judgment ought to be taken for the purposes of the conversion of the debt into English currency and not the rate of exchange current at the date of payment, as the debt exists in francs until it is converted into sterling.

The judge goes on to say that there is no real difference, and he again treats it as a claim for debt.

To complete matters, only last year in the Court of Appeal there was *Vionnet (Madeleine) et Cie.* v. *Wills* (10). The case raised the same point as to the date at which the rate of exchange was to be calculated, and the headnote in the Law Times Reports is as follows:

> A creditor for a debt incurred abroad in a foreign currency is entitled in a suit in the courts of England to recover the equivalent of the debt in our currency calculated according to the rate of exchange prevailing when the debt first became payable.

The judgment deals first with what the law is on a claim for damages, and then it proceeds to discuss whether or not the same rule applies in an action for debt. Various cases to which I have referred were dealt with, and judgment was given for the debt, the rate of exchange being calculated at the date at which payment ought to have been made.

The court, of course, must be in a difficulty, as counsel for the defendant was good enough to admit, when there are conflicting decisions of the Court of Appeal and each side can produce a decision of the Court of Appeal deciding the point in its favour. I suppose I am entitled to choose between these decisions. I cannot ignore this long line of A authorities, nor can I ignore the fact that *Vionnet* (*Madeleine*) *et Cie.* v. *Wills* (10) seems to me to make it perfectly clear that the claim here is one of debt, and not one for damages for breach of contract.

If that is so, there is nothing left of the argument of counsel for the defendant based on this being a claim for damages. I do not think B that the claim arises in that way. I think that it was for debt, and that in September there was nothing illegal about payment in London, and that the plaintiff is entitled to his judgment.

There are one or two other points pleaded and relied upon. The first is that, earlier in the year, there had been a payment of 40,000 marks into C some bank in Germany to a blocked account for the benefit of the plaintiff. In fact, that bank had no authority from the plaintiff to receive any payment. It was not his bank and had no authority to receive the payment. The plaintiff knew nothing of it. He never assented to it, and obviously that point cannot be relied upon.

D Then there was a payment which was made to the plaintiff's solicitor in Berlin on Oct. 4, 1938. It was not the full payment, but it was treated as the full payment, because there was clear readiness and willingness to pay the rest of the money in the same way if the plaintiff would accept it. He refused to take it, saying that he was not bound to E do so. His solicitor communicated with the authorities about it, and there are two letters which have some bearing on the matter. On Nov. 18, 1938, the currency authorities wrote as follows to the solicitor :

> I am unable to consent to your application of Nov. 11 to accept the sum of RM. 40,000 remitted to you by Treitel & Meyer Berlin in favour of Mr. Julius F Graumann, at present residing in London. I would ask you to return to the inland-resident paying it, the sum which has been held in trust by your partner, Mr. W. Feaux de Lacroix, solicitor and notary in Berlin.

On Apr. 17, 1939, the solicitor, who, wanting to be certain that there was no difficulty about the proceedings here, had applied again to the authorities, received the following letter :

G

> To my regret I am not in a position to grant Mr. Hans Treitel of London the permission to use approximately RM. 78,000 to the debit of his blocked funds in Germany in favour of the emigrant Mr. Julius Graumann of London's blocked account at the Commerx & Privatbank Dep. Kasse A. in Berlin C.2, Hausvogteiplatz 10, because it is a question of the settlement of a claim of one currency foreigner against another currency foreigner which latter (Mr. Graumann) is in a position to make effective abroad.

H

There the currency authorities in Berlin are expressing precisely the view which I have formed—namely, that they were not going to agree to any payment out of Germany to the plaintiff, because the defendant had now become a currency foreigner. It was a simple question of one currency foreigner paying another in foreign currency, and there was nothing to prevent his doing so. Although I do not suppose it was necessary to obtain the consent of the authorities or their view, it is of interest to have it.

A further question arises, not as to the date at which the rate of exchange is to be taken, but as to the rate at which it is to be calculated, and I must say that I have been a little puzzled about that. When I go into it, however, I really do not think that I have any choice but to calculate the sterling at the official current rate of exchange at the time when payment ought to have been made. Again and again in the cases it is put as the current rate of exchange between the two countries, and in this case that was in the neighbourhood of 12 marks to the £. The point of doubt which has arisen in my mind is that in Sept., 1938, the defendant in London could have bought marks on the foreign exchange market here at about 36 or 37 to the £. It seems quite clear that, if he had chosen to produce marks, and to pay to the plaintiff the number of marks which he owed him, that would have been a good discharge. *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* (5) would be an authority for that. That position is made quite clear in DICEY'S CONFLICT OF LAWS, 5th Edn., p. 730:

> A contract is clearly discharged by payment under its proper law, and if a foreign country re-values its currency no doubt effect will be given to this change in the enforcement in England of any contract whose proper law is foreign. But, failing that, discharge in the legal currency is valid, even if it be worthless paper, or have fallen greatly in value, or, of course, have appreciated.

If the defendant had chosen to acquire marks and to pay, he might have been able to plead a discharge. He has not done that and it has never been suggested that, when, for the purpose of the judgment, one comes to convert the amount of the debt into sterling, one can take the rate at which foreign currency could or might have been bought on the foreign exchange market in London. It appears to me that I am driven to take the official rate of exchange existing at the date when payment ought to have been made, which comes to £6,799 6*s*. 3*d*. It is fair to point out that, in arriving at the marks to be paid out by the defendant at the dissolution, the value of the English capital was turned into marks at that same rate, and, therefore, there is really no injustice done to the defendant. However, I am bound by the rule, and I have to apply it.

Judgment for the plaintiff for £6,799 6*s*. 3*d*. (*being the debt with interest to date of writ*) *and interest to date of payment with costs.*

Solicitors: *Kerly, Sons & Karuth* (for the plaintiff); *Buckeridge & Braune* (for the defendant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Disapproved. AMAL. ANTHRACITE COLLIERIES, LTD. *v.* WILDS. [1948] 2 All E.R. 252.

EVANS *v.* OAKDALE NAVIGATION COLLIERIES, LTD.

[COURT OF APPEAL (Slesser, Luxmoore and Goddard, L.JJ.), **February 20, 21, March 4, 8, 11, 18, 1940.**]

Workmen's Compensation—Compensation—Amount—Partial incapacity from first accident at time of certification of silicosis—Amount of compensation for silicosis—Workmen's Compensation Act, 1925 (c. 84), *ss.* 9, 43, 47—*Various Industries (Silicosis) Scheme,* 1931. (*S.R. & O.*, 1931, *No.* 342), *paras.* 5, 8, 9.

On Aug. 12, 1935, while in the employment of the appellant company at a wage of £3 11*s.* 1*d.* per week, the respondent met with an accident to his ribs. While still partially incapacitated from that accident, he was certified as suffering from silicosis, this disability being dated as from Nov. 18, 1936. After certification the appellant company paid him 30*s.* per week compensation, 16*s.* 9*d.* being in respect of the partial incapacity arising from the rib accident and 13*s.* 3*d.* being in respect of the silicosis. On July 15, 1937, the appellant company alleged that the respondent had completely recovered from the rib accident, but continued to pay him 30*s.* per week, all of which was then allocated to the silicosis. On Dec. 16, 1937, the arbitrator, whose award was upheld on appeal, held that the respondent was still suffering from the partial incapacity resulting from the rib accident, and that he was entitled to 16*s.* 9*d.* per week compensation therefore. The appellant company thereupon contended that the compensation in respect of the silicosis should be calculated on the basis that the respondent was a partially incapacitated man. The appellants also contended that under the Workmen's Compensation Act, 1925, s. 9 (1) (*b*), in fixing the compensation for silicosis, the court should have regard to the payment they had made for the same period in respect of the rib injury. The respondent contended that he was entitled to be paid compensation calculated on the basis of his earnings for the 12 months in which he was last employed in the process in which he contracted the disease—namely, 30*s.* per week compensation based on earnings of £3 11*s.* 1*d.* per week :—

HELD : (i) the respondent was entitled to compensation in respect of the silicosis at the full rate of 30*s.* per week, the rate of compensation being based, not on the earnings of the workman at the date of certification, but on his earnings during the last 12 months in the employment in the process which gave rise to the disease.

(ii) the payments made in respect of the rib accident ought not to be taken into account, as they were made in respect of a different liability.

[**EDITORIAL NOTE.** The Court of Appeal has distinguished the case where there are two physical accidents from that where one of the accidents is a notional one—that is, certification of an industrial disease. The Act provides a different method of computation of the pre-accident earnings in cases of industrial disease, and, for this reason, where the second accident is a notional one, the workman is not limited in the amount of the compensation in respect of the second accident to the capacity for work remaining after deduction of the incapacity then existing by reason of the first accident.

AS TO COMPENSATION IN CASES OF MORE THAN ONE ACCIDENT, see WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 283-285 ; and FOR CASE, see DIGEST, Supp., Master and Servant, No. 3362a.]

Cases referred to :

(1) *Evans* v. *Oakdale Navigation Collieries, Ltd.*, [1939] 2 All E.R. 358 ; Digest Supp. ; 32 B.W.C.C. 51.

(2) *Wheatley* v. *Lambton, Hetton & Joicey Collieries, Ltd.*, [1937] 2 K.B. 426 ; [1937] 2 All E.R. 756 ; Digest Supp. ; 106 L.J.K.B. 667 ; 156 L.T. 490 ; 30 B.W.C.C. 171.

(3) *Thompson* v. *London & North Eastern Ry. Co.*, [1935] 2 K.B. 90; Digest Supp.; 104 L.J.K.B. 515; 152 L.T. 571; 28 B.W.C.C. 95.

(4) *Bacon* v. *Wills (A. W.) & Sons, Ltd.*, [1933] 2 K.B. 493; Digest Supp.; 102 L.J.K.B. 611; 149 L.T. 385; 26 B.W.C.C. 374.

(5) *Harwood* v. *Wyken Colliery Co.*, [1913] 2 K.B. 158; 34 Digest 348, *2803*; 82 L.J.K.B. 414; 108 L.T. 283; 6 B.W.C.C. 225.

(6) *Cole* v. *Amalgamated Anthracite Collieries, Ltd.* (1933), 26 B.W.C.C. 560; Digest Supp.

(7) *Colville* v. *Tigue* (1905), 8 F. (Ct. of Sess.) 179; 34 Digest 448, case *h*.

(8) *Lysons* v. *Knowles (Andrew) & Sons, Ltd.*, *Stuart* v. *Nixon & Bruce*, [1901] A.C. 79; 34 Digest 423, *3433*; 70 L.J.K.B. 170; 84 L.T. 65; 3 W.C.C. 1; *revsg.*, [1900] 1 Q.B. 780; *and revsg.*, [1900] 2 Q.B. 95.

(9) *Lewis* v. *Wrexham & Acton Collieries, Ltd.* (1916), 85 L.J.K.B. 1456; 34 Digest 402, *3283*; 115 L.T. 367; 9 B.W.C.C. 518.

(10) *Lewis* v. *Cammell, Laird & Co., Ltd.* (1929), 22 B.W.C.C. 410; Digest Supp.

(11) *Lewis* v. *Guest, Keen & Nettlefolds, Ltd.*, *Watkins* v. *Same*, *Tucker* v. *Same*, *Ingram* v. *Crawshay Brothers*, [1928] 1 K.B. 20; Digest Supp.; 96 L.J.K.B. 664; 137 L.T. 386; 20 B.W.C.C. 359.

Appeal by the respondents from an award given by His Honour Judge Thomas at the Tredegar County Court on Jan. 20, 1940. The facts are fully set out in the judgment of Slesser, L.J.

F. W. Beney and *Griffith Williams* for the appellant company.

Gilbert Paull, K.C., *G. R. Blanco White, K.C.*, and *A. A. Warren* for the respondent.

Beney: The measure of compensation must be related to the loss of earning power: *Harwood* v. *Wyken Colliery Co.* (5). There is no distinction in principle between cases where injury by accident overtakes an already wholly incapable man and cases where such injury overtakes an already partially disabled man. In neither case should the man be compensated for something already lost. The rules as to assessment either in the Act or in the scheme cannot be used to cut down the right to compensation (*Lysons* v. *Knowles (Andrew) & Sons, Ltd.*, *Stuart* v. *Nixon & Bruce* (8)), or to enlarge it (*Wheatley* v. *Lambton, Hetton & Joicey Collieries, Ltd.* (2)), and, if the scheme purports to do so, it is to that extent *ultra vires*. Compensation in cases of industrial disease must be calculated with reference to the earnings of the workman in the employment of the employer who last employed him, but that only means that the compensation for total incapacity must not exceed 50 per cent. of those average weekly earnings. *Bacon* v. *Wills (A. W.) & Sons, Ltd.* (4) decided no more than that the words "average weekly earnings during the previous 12 months" in sect. 9 of the Act should be replaced by the words "average weekly earnings during the 12 months when he last worked for the employer in whose service he contracted the disease." If the employer who has to pay compensation in respect of an industrial disease has already paid compensation for the same period of incapacity, although such compensation is paid in respect of another accident, he can ask the arbitrator fixing the compensation for total incapacity due to the disease to have regard to the payments he has made. [Counsel also referred to *Lewis* v. *Wrexham & Acton Collieries, Ltd.* (9) and *Thompson* v. *London & North Eastern Ry. Co.* (3).]

White, K.C.: The later accident is irrelevant. Compensation must be calculated under the scheme in exactly the same way as though A the workman had been later injured in an ordinary road accident. This case is covered by *Cole* v. *Amalgamated Anthracite Collieries, Ltd.* (6) unless there is anything to the contrary in *Wheatley* v. *Lambton, Hetton & Joicey Collieries, Ltd.* (2), but this latter case decides no more than that compensation cannot be obtained if there is no capacity to be lost. This B argument does not apply if there is any capacity at all to be destroyed. *Thompson* v. *London & North Eastern Ry. Co.* (3) only decided that, where a man is totally incapacitated, the Act must be applied to his case independently of whether or not he has been the subject of a previous accident: *Wheatley* v. *Lambton, Hetton & Joicey Collieries,* C *Ltd.* (2), *Evans* v. *Oakdale Navigation Collieries, Ltd.* (1), *Lewis* v. *Cammell, Laird & Co., Ltd.* (10) and *Lewis* v. *Guest, Keen & Nettlefolds, Ltd.* (11).

SLESSER, L.J. [read by LUXMOORE, L.J.]: On Aug. 12, 1935, D Thomas Evans, a collier, met with an accident while working for the appellant company. At the time he was earning £3 11*s.* 1*d.* per week. Several ribs were fractured, and from then until Dec. 9, 1936, he was paid compensation on the basis of total incapacity at the rate of 30*s.* per week. On that date, his employers, asserting that his earning E capacity was then to be assessed at £1 17*s.* 6*d.* per week, later taken to be £1 19*s.*, having served notice under sect. 12 of the 1925 Act after examination by their doctor, there being no counter-notice, reduced the compensation to 19*s.* per week.

On Feb. 22, 1937, the Silicosis Medical Board certified the workman F to be suffering from silicosis as a result of his employment, and dated the disability back to Nov. 18, 1936. Thereafter, the employers again paid him 30*s.*, allocated, as the receipts show, as to 16*s.* 9*d.* partial incapacity due to the rib accident, and as to 13*s.* 3*d.* due to silicosis. On July 15, 1937, they served a notice on him alleging that he had G wholly recovered from the effects of the 1935 rib accident, but continued to pay him 30*s.* solely, as the receipts show, in respect of silicosis. On Aug. 22, 1938, the workman claimed arbitration, alleging that, apart from the 30*s.* he was receiving in respect of silicosis, he was still entitled to the 16*s.* 9*d.* in respect of the 1935 rib accident.

H The judge held on Dec. 16 that on Nov. 18, 1936, the workman at the time of the notional accident—that is, silicosis—was still partially incapacitated from the rib accident and thereafter, and awarded the workman 16*s.* 9*d.* per week from July 15, 1937, when the employers had stopped that payment. The employers unsuccessfully appealed to this court, and the award was affirmed.

In that appeal before SIR WILFRID GREENE, M.R., CLAUSON and DU PARCQ, L.JJ.—*Evans* v. *Oakdale Navigation Collieries, Ltd.* (1)—SIR WILFRID GREENE, M.R., points out, at pp. 360, 361, that, in accordance with *Wheatley* v. *Lambton, Hetton & Joicey Collieries, Ltd.* (2):

> . . . so long as the total incapacity from the first accident lasted, no compensation could be recovered in respect of the second accident, although in respect of that A
> second accident a declaration of liability might properly have been made. That would have been the situation on such a finding of fact, but the county court judge's finding of fact, if it can be supported, brings the case within the clear authority of the decision of this court in *Thompson* v. *London & North Eastern Ry. Co.* (3).

In the present proceedings, the workman, basing his claim solely on the total disablement by silicosis, claimed 30*s.* per week on the basis of B
total incapacity from Dec. 17, 1936, credit being given for amounts received. He stated that since July 15, 1937, he had received in all only £1 2*s.* 3*d.* per week for silicosis, based on an earning capacity agreed by the employers and workman to be £1 19*s.*, due to his existing partial incapacity on Nov. 18, 1936, which had been brought about by the C
1935 rib accident, and contended that, by reason of the provisions of the Various Industries (Silicosis) Scheme, 1931, he was entitled to assess his pre-accident earnings before Nov., 1938, for the purpose of assessing compensation for incapacity due to silicosis, on the basis of the earnings of the 12 months in which he was last employed in the process in which D
he contracted the disease—that is, from Aug., 1934, to Aug., 1935, when the average weekly earnings were over £3, which sum would entitle him, on the basis that he was then of normal capacity, to compensation at the rate of 30*s.* per week, and not the £1 2*s.* 3*d.* actually paid. E

A distinction must be made, in considering cases where one accident follows another, between those cases where both accidents are actual physical ones and those cases where the later accident is notional, arising from a doctor's certificate under sect. 43 of the Act or under the Various Industries (Silicosis) Scheme—accidents certified in case of industrial F
disease. The reason for this distinction is due to the fact that, in the case of the Various Industries (Silicosis) Scheme, 1931, the Metal Grinding Industries Scheme, 1927, and sect. 43 of the Act, in computing the pre-accident earnings, *Bacon* v. *Wills (A. W.) & Sons, Ltd.* (4), actually decided under the Metal Grinding Industries Scheme, 1927, s. 8, G
establishes that, in construing the words "during the previous 12 months" in sect. 9 (2) of the 1925 Act, here to be read with the Various Industries (Silicosis) Scheme, 1931, para. 9, in computing the amount of compensation, those words in sect. 9 (2) must be read as if they were "the weekly payment shall be a sum not exceeding 50 per cent. of the H
workman's weekly earnings during the 12 months in the employment in the process which gives rise to the disease."

In the case of two actual physical accidents, where the pre-accident earnings are to be computed on the basis of the previous 12 months according to the plain words of sect. 9 (2) of the Act, and a claim is made as regards a second accident while incapacity still exists from a former one, the compensation for the later accident can only be that proportion of incapacity on which the second accident can operate. This basis of ascertainment of the second pre-accident wage, where two physical accidents are concerned, is not here questioned, and is supported by the authority of such cases as *Harwood* v. *Wyken Colliery Co.* (5), *Thompson* v. *London & North Eastern Ry. Co.* (3), at p. 98, and the *dicta* of SIR WILFRID GREENE, M.R., in *Evans* v. *Oakdale Navigation Collieries, Ltd.* (1), at p. 56, which last were made *obiter*, and are, I think, to be treated as dealing with the earlier cases on this principle only.

Another possibility, which applies whether or not the second accident is notional, is the case where the first accident has produced a state of total disability. In such a case, there is no capacity on which the second accident can operate, and this notwithstanding the interpretation which is required by *Bacon's* case (4) to be put on sect. 9 (2) of the Act in the case of industrial diseases. These were the facts in *Wheatley* v. *Lambton, Hetton & Joicey Collieries, Ltd.* (2), which was a case of a second notional accident—nystagmus—supervening on a previous accident which had caused total disability. There, a workman who had been totally incapacitated by a physical injury to his spine, and was receiving 30*s.* full compensation, was subsequently, while in receipt of that compensation, certified to be suffering from miners' nystagmus. He claimed a further sum of 24*s.* per week as compensation as well as his 30*s.* for his physical accident on the basis of a lower rate of wages which he had been earning during a temporary return to work after the spinal injury before he became totally incapacitated from that injury. It was held that, so long as he was totally incapacitated from the spinal injury, he could not be regarded as being incapacitated from nystagmus, for he had no capacity left to lose, and the case, for that reason, was distinguished from the cases where there was left after the first accident existing partial capacity on which the second accident could operate.

The problem here raised, however, is a different one, distinguishable from both those mentioned above. On Nov. 18, 1936, unlike the facts in *Wheatley's* case (2), there was some capacity, the disability produced by the rib accident being then only partial, which the silicosis could be said to affect, and the question then arises as to how that capacity should be quantified. According to the appellants, owing to the partial incapacity due to the rib injury, on the principle of *Harwood's* case (5) and *Thompson's* case (3), there is left only a capacity of £1 19*s.*, as in the case of two physical accidents. According to the workman, he must be notionally regarded on Nov. 18, 1936, as having then a full earning capacity, which has been totally destroyed by the silicosis—an earning capacity of £3 11*s.* 1*d.* per week. The result in compensation would be £1 2*s.* 3*d.* or £1 10*s.* respectively.

In my judgment, *Cole* v. *Amalgamated Anthracite Collieries, Ltd.* (6) decides this issue in the workman's favour. There, the average weekly earnings were £2 16*s.* 8*d.* when the workman gave up work in Nov., 1929, by reason of illness which proved to be silicosis. From June, 1930, to Mar., 1931, he returned to work with the same employers as a whitewasher at the rate of £2 5*s.* 4*d.* per week. On May 12, 1932, he was certified to be suffering from silicosis as from Jan. 1, 1932. At that time, his earning capacity, owing to illness (as here owing to the rib accident), was reduced in reality in that case to £2 5*s.* 4*d.* per week, and the county court judge, treating the case as falling within the principle to be applied where the second accident was not notional, gave judgment for compensation on that lesser basis for £1 2*s.* 8*d.* per week. The workman appealed, asking for 50 per cent. of his underground collier's wages of £2 16*s.* 8*d.*, an increase of 5*s.* 8*d.* in the compensation. That is, he asked the court to treat the notional accident as destroying his full capacity. The court, applying *Bacon's* case (4), allowed the appeal. Romer, L.J., said, at p. 569 :

> . . . this court laid down a general principle, as I understand the judgments, (in *Bacon's* case (4)) applicable to all cases in which one has to apply the provisions of sect. 9 (2) [of the 1925 Act] to such schemes as the Various Industries (Silicosis) Scheme, 1931, with which we have to deal in this case.

He quoted with approval the headnote in the Law Reports in *Bacon's* case (4) :

> " The provision in sect. 9 (2) of the Act that the weekly payment of compensation in cases of total incapacity shall be fixed by reference ' to the workman's average weekly earnings during the previous 12 months ' must for the purpose of the Various Industries (Silicosis) Scheme, 1931, be moulded so as to apply to the altered circumstances by treating it as referring to the previous 12 months during which the workman was employed in a process coming within the scheme."

Thus, so generally applying the scheme here, this workman notionally met with his silicosis accident on Nov. 18, 1936, and during the year of his notional injury preceding the accident he is to be deemed to be physically capable of earning £3 11*s.* 1*d.*, his full wage. Thus regarded, his capacity to earn during the period Nov., 1935, to Nov., 1936, although in reality reduced by his rib accident to a partial capacity on Dec. 9, 1936, to £1 19*s.*, was, notionally, to be regarded as unimpaired. The case is taken out of the category of a second physical accident acting upon an already limited capacity, as in *Harwood's* case (5) and *Thompson's* case (3), and must be deemed to be a case where, notwithstanding the actual partial incapacity due to the rib accident, the Various Industries (Silicosis) Scheme, 1931, requires the workman, in the circumstances, to be assumed to be of full capacity, and to be assumed to be capable of earning £3 11*s.* 1*d.* per week at the date when he was certified in Nov., 1936, to be totally incapacitated by silicosis.

In *Cole's* case (6), as I have indicated, a similar situation existed. The workman, having suffered a notional accident on Jan. 1, 1932, by reason of his illness, was capable of working as a whitewasher only. He had been a whitewasher since 1930, and the county court judge there, taking his pre-accident earnings on an average weekly basis from

1931 to 1932, awarded him compensation at a lower rate. Nevertheless, this court, construing the scheme, as Romer, L.J., points out, according to *Bacon's* case (4), went back to the year when, fully capable as a collier, he had contracted the disease. Once it is realised that in industrial disease the legislature, in its humorous wisdom, has ordained that, contrary to natural experience, the injury (the disease) must be regarded as preceding the accident (the certification), the apparent paradox of a notional full capacity when actually there is partial disbility is resolved.

Finally, counsel for the appellants contended that the past payments in respect of the rib injury were payments within sect. 9 (1) (*b*) of the 1925 Act, and should be taken into account in favour of the employer. Such a consideration must fail, because those payments were made in discharge of a different liability arising from a different accident from the liability to pay compensation in respect of silicosis here relied upon.

In the view I have taken, it is not necessary for the workman to rely upon the alleged agreement to pay him 30*s.* per week for compensation for silicosis to be deduced from such payments from July, 1937, to Nov., 1938, on receipts shown to be for silicosis alone. The absence of a recording of such an agreement, if found, might be an obstacle to reliance upon it in a claim: *Colville* v. *Tigue* (7). In fact, the judge has found no such agreement. I do not think it necessary, in the circumstances, definitively to pronounce upon it.

Luxmoore, L.J.: The question raised by this appeal is as to how compensation ought to be assessed under the Workmen's Compensation Act, 1925, and the Various Industries (Silicosis) Scheme, 1931, made and amended under that Act, in respect of the disability of a workman who was certified as totally incapacitated by silicosis as from Nov. 18, 1936, when at that date he was being paid compensation for partial incapacity arising from an injury by accident suffered on Aug. 12, 1935.

The county court judge awarded the workman compensation in respect of the total incapacity from silicosis at the rate of 30*s.* per week, having fixed that sum with reference to the average weekly earnings of £3 11*s.* earned by the workman during the 12 months immediately preceding the cesser on Aug. 12, 1935, of his employment as a coal miner working underground.

The employers, Oakdale Navigation Collieries, Ltd. (hereinafter referred to as the company), employed the workman, not only before and at the time of the accident of Aug. 12, 1935, but also after that date, when the workman had recovered sufficiently from the results of the injury by accident on Aug. 12, 1935, to be able to do light work. The company contended that the compensation for the disablement by silicosis ought to be fixed with reference to the average weekly wage of £1 19*s.* which the workman was deemed to be capable of earning as a partially incapacitated man immediately before the certificate of total

disablement was given, and submitted to pay to the workman in respect of the incapacity from silicosis at the rate of £1 2*s.* 3*d.* per week, in addition to the sum of 16*s.* 9*d.* per week which the company was paying to the workman as compensation for his partial incapacity arising from the other injury under an award made by the same county court judge, dated Dec. 13, 1938, and affirmed by this court on Apr. 4, 1939: *Evans* v. A
Oakdale Navigation Collieries, Ltd. (1). The company has appealed from the award of the county court judge in respect of the disablement by silicosis, and has relied on the contention to which I have already referred. The right to compensation in respect of disablement by silicosis is covered by sect. 47 of the Act of 1925, which gives power by B
scheme to provide for payment of compensation by employers of workmen in any specified industry involving exposure to silica dust who are certified in the prescribed manner to have suffered total disablement from silicosis. Sect. 47 (2) provides that the scale of compensation fixed in the case of total disablement due to silicosis where (as in the C
present case) it is not accompanied by tuberculosis shall be prescribed by the scheme. Sect. 47 (4) provides that any scheme made under the section is to " have effect as if enacted in this Act," subject to certain conditions to which it is unnecessary to refer. The Various Industries (Silicosis) Scheme, 1931, was made and amended from time to time D
under the powers conferred by sect. 47, and has statutory force by reason of the provisions of subsect. (4) of that section. The processes covered by the scheme include any operation underground in any coal mine. Para. 5 of the scheme provides that, if the workman has been employed in the processes for a period or periods amounting to not less E
than 5 years, the disease shall be deemed to be due to employment in the processes unless the employer proves the contrary. It is, I understand, common ground that the workman was immediately before the accident on Aug. 12, 1935, employed underground by the company in its coal mine, and had been so employed for more than the preceding F
5 years.

By para. 8 (1) of the scheme, it is provided that the compensation shall be claimed and recoverable from the employer who last employed the workman in the process. The last employer is admittedly the company. By para. 9 (1) of the scheme, it is provided that in cases of total G
disablement the compensation under the scheme shall be determined in accordance with the provisions contained in the Act for fixing the compensation in cases of total incapacity. This incorporates into the scheme the provisions of sect. 9 of the Act. Sect. 9 (2) (i) provides that " the weekly payment shall . . . be a sum not exceeding 50 per cent. of the H
workman's average weekly earnings during the previous 12 months," subject to the alteration, made by para. 9 (3) of the scheme, that, in the application of the provisions of the Act, the amount of compensation shall be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under the scheme.

The material provisions of the Act and the scheme, when applied to the present case, if considered apart from any of the decided cases, appear to contradict the contention put forward on behalf of the company. The express words of para. 9 (3) provide that the earnings to be considered are not those earned by the workman in the 12 months previous to the date of the disablement, but those earned by him under the employer from whom the compensation is recoverable. To apply to the facts of the present case the words referred to, the compensation to be paid to the workman in respect of his total disablement by silicosis is to be calculated with reference to the average weekly earnings of £3 11*s.* 1*d.*, and not with reference to the average weekly earnings of £1 10*s.* which he is deemed to be capable of earning owing to his partial incapacity arising from the accident of Aug. 12, 1935. I am unable to find any words, either in the Act or in the scheme, to suggest that in any case the compensation for total disablement by silicosis is to be calculated with reference to any average weekly earnings other than those of the workman under the employer who last employed the workman in the process in which the notional injury by accident caused by contracting silicosis arose, or with reference to any want of capacity other than total incapacity. It was said that there are a number of reported cases in the books which lead to a different conclusion. During the argument, our attention was called to a large number of these cases. It is not from want of respect for them, or for the skilful argument of counsel for the appellants, that I refrain from dealing with the majority of these cases, for, in my judgment, practically all of them are clearly distinguishable on their facts from the present case. It is sufficient, I think, to point out that there is a material difference between the case where a workman is in the first instance partially incapacitated by an injury by accident other than a notional accident by disease, and is then rendered totally incapable by reason of a second accident, which is also not a notional one, and the case where the original partial incapacity is followed by total incapacity arising from a notional accident caused by industrial disease. In the former case, the compensation in respect of the second accident, which resulted in the partial incapacity from the first accident becoming total incapacity, must, on the true construction of the Act, be calculated with reference to the average weekly earnings immediately preceding the second accident: *Harwood* v. *Wyken Colliery Co.* (5) and *Thompson* v. *London & North Eastern Ry. Co.* (3), at p. 98.

Of course, if, as the result of the first accident, the workman suffers total disability, it matters not whether or not he is subsequently certified to be suffering from an industrial disease which also has rendered him totally incapacitated, for in such a case there is no capacity for work on which the notional accident can operate: *Wheatley* v. *Lambton, Hetton & Joicey Collieries, Ltd.* (2). As SIR WILFRID GREENE, M.R., pointed out in *Evans* v. *Oakdale Navigation Collieries, Ltd.* (1), so long as the total incapacity lasted from the first accident, no compensation could be recovered in respect of the second accident, although in respect of the second accident a declaration of liability might properly be obtained.

I think that the view I have expressed with regard to the construction of the Act and the scheme is supported by the decision of this court in *Cole* v. *Amalgamated Anthracite Collieries, Ltd.* (6). This case was relied on by the county court judge in support of his finding, and I think he was fully justified in such reliance. In the earlier appeal between the workman and the company, it was held that the workman was entitled to receive the compensation awarded to him in respect of the partial incapacity arising out of the accident of Aug. 12, 1935, notwithstanding the certificate of total incapacity arising from silicosis. I have been unable to find anything in the judgment of the court in that case which could be said to cover the question to be determined on this appeal. In my judgment, this case must be decided on the plain words of the Act and the scheme. On this basis, I am satisfied that the decision of the county court judge is correct, and should be upheld.

Counsel for the appellants also argued that, apart from the question as to the proper construction of the Act and the scheme, during the period of incapacity the company had paid compensation to the workman in respect of his disability arising out of the accident of Aug. 12, 1935, and that, by reason of the provisions of sect. 9 (1) (*b*) of the Act, the company was entitled to ask the county court judge and this court to have regard to these payments in fixing the compensation for total incapacity due to silicosis. Sect. 9 (1) (*b*) of the Act of 1925 provides that, in fixing the amount of the weekly payments, regard shall be had to any payment, allowance or benefit which the workman may receive from the employer during the period of his incapacity. In my opinion, the payment, allowance or benefit there referred to is, on the true construction of the section, confined to payment, allowance or benefit received from the employer in respect of the incapacity arising from the particular injury under consideration, and does not extend to payment, allowance or benefit received in respect of some other injury, or for some wholly independent reason.

There is one further matter to which I must refer. It was argued on behalf of the workman that the company was unable to contest the award of 30*s.* per week in respect of the total incapacity from silicosis, because the company had from July, 1937, to Nov., 1938, paid to the workman a weekly sum of 30*s.* in respect of the silicosis alone, and that this was sufficient to constitute a binding agreement between the parties. To dispose of this argument, it is sufficient to point out that the question whether or not there is in existence an agreement of the nature claimed is one to be determined by the arbitrator: see sects. 21 and 23 of the Act of 1925. An unrecorded agreement can only be used as an answer to a request for arbitration or as a defence to an action. It cannot be itself the subject of arbitration proceedings under the Act: *Colville* v. *Tigue* (7). For the reasons I have expressed, I agree that the conclusions at which the county court judge arrived are correct, and there is no ground for altering his award in any respect. The appeal fails, with the usual consequences.

A GODDARD, L.J.: I agree that this appeal fails. On Feb. 22, 1937, it was certified that the respondent was totally disabled from silicosis and that disablement commenced on Nov. 18, 1936. On the latter date, the respondent was in receipt of compensation for partial disablement due to an injury sustained on Aug. 12, 1935, and that compensation
B lasted till July 15, 1937, when it ceased. The appellants continued to pay at the rate for total disablement from silicosis down to Dec., 1938, when it was held by the county court judge that the workman had again suffered from the injury which had caused partial disablement since Nov., 1938, and this award was upheld on appeal.
C As a collier in full work, his earnings averaged £3 11*s.* 1*d.* As a partially disabled man, his average earnings on light work were £1 19*s.* When the compensation for partial disablement was restored, the appellants took up the position that the compensation for silicosis should be calculated on the basis that he was a partially disabled man, and
D that his earnings should have been taken as £1 19*s.* per week, and not £3 11*s.* 1*d.*, and the only question is whether or not this is right.

Under the Various Industries (Silicosis) Scheme, 1931, para. 8, made under the Act, the compensation is recoverable from the employer
E who last employed the workman in the process which caused the disease —in this case, coal-mining. By sect. 9 (3), the amount is to be calculated with reference to the earnings of the workman under the employer from whom compensation is payable. If I may have regard only to the words of the scheme, which for this purpose has the effect of a statute,
F and if I am unhampered by authority, I think that it is clear that all the arbitrator has to do is to see what the man was earning in the process which caused the disease. In this case, the answer is £3 11*s.* 1*d.* If he worked for employer A at such a process, and earned £3 11*s.* 1*d.*, and afterwards, but before certification, worked for employer B, in whose
G service he met with an accident which reduced his earning capacity to £1 19*s.*, it seems to me that, if I looked at £1 19*s.* as the basis on which to calculate compensation, I should be disregarding the plain words of the statute, for the workman never earned that sum under the employer by whom compensation for silicosis is payable. It cannot,
H in my opinion, make any difference that he remains with the same employer, though in a different capacity.

However, counsel for the appellants argued that there are cases binding on this court which decide the contrary. In my opinion, there is no case which so decides. No doubt the cases show that, if a man is working as a partially disabled man at wage X, and meets, while working at that

wage, with a further accident, his compensation for the latter accident is to be calculated on the wage he was earning at the time when he met with it: *Harwood* v. *Wyken Colliery Co.* (5) and *Thompson* v. *London & North Eastern Ry. Co.* (3). The reasoning on which those cases were decided, however, does not apply, in my opinion, to cases of industrial disease, which have a code of their own. In such cases, regard is to be A
had, not to the wage the man was earning at the date of the certification, which is the date of the notional accident, but to the wage he was earning when he contracted the disease, or, to use the language of the scheme, when he was last employed in the process. The case most relied upon by counsel for the appellants was *Wheatley* v. *Lambton, Hetton & Joicey* B
Collieries, Ltd. (2), but, when properly understood, that case has no application to the present facts. There a man was totally disabled by an accident in the popular sense, an injury to his spine. While so disabled, he developed nystagmus, and got a certificate of total disablement. The date of that disablement, and, therefore, of the notional accident, C
was subsequent to that of the accident causing the spinal injury. The court held that one cannot add to totality, or subtract from nothing. Therefore, as, at the date when the "accident" from nystagmus occurred, he was already totally disabled, he could recover nothing for the latter injury, but was granted a declaration of liability in case he recovered D
from the spinal injury. The man in that case had not at any material time a capacity on which the second accident could operate, while in the present case he had. It is, of course, impossible for the precise question we have to consider to arise except in connection with an industrial disease which gives rise to this conception of notional accident, or notional E
date of accident, because it is impossible for a workman totally disabled by accident to meet with another accident in the popular sense arising out of and in the course of his employment, which *ex hypothesi* he is disabled from following.

However, so far as authority is concerned, I think that *Cole* v. F
Amalgamated Anthracite Collieries, Ltd. (4), on which the county court judge relied, is an authority supporting the view he expressed. The workman there contracted the disease when working as a collier. At the date of the certificate, having previously been ill, he was working as a whitewasher, in which latter work he could not have contracted G
the disease. He was held to be entitled to compensation as a collier.

This court has already had the parties before it in an earlier case arising out of the accident which caused partial incapacity to the workman—*Evans* v. *Oakdale Navigation Collieries, Ltd.* (1)—but, having H
carefully read the judgment in that case, I am satisfied that the court had not to consider the question as to what compensation the workman was entitled to for silicosis, and, accordingly, it is not an authority upon the matter which we have to decide. On the question of whether or not there was an agreement on which the workman could rely, I need say no

more than that I agree with the judgment of LUXMOORE, L.J., on that point, and that the applicant cannot rely upon it.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Furniss Wells & Co.*, agents for *A. J. Prosser*, Cardiff (for the appellants); *Smith, Rundell, Dods & Bockett*, agents for *T. S. Edwards & Son*, Newport, Mon. (for the respondent).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

LIFFEN *v.* WATSON.

[COURT OF APPEAL (Slesser, Luxmoore and Goddard, L.JJ.), **February 22, 1940.**]

Negligence—Personal injuries—Damages—Domestic servant receiving board and lodging as part wages—Claim for loss of board and lodging—Board and lodging received from parent without payment.

The appellant, a domestic servant, was injured by the negligent driving of the respondent. Her wages were £1 per week and board and lodging. After her discharge from hospital, she went to live with her father, and paid nothing for her board and lodging. She claimed as damages in addition to loss of wages the loss of the board and lodging. The appellant also claimed damages for traumatic neurosis:—

HELD: (i) the damages ought to include a sum in respect of the loss of board and lodging upon the same footing as the loss of wages. Any arrangement the appellant made with her father was immaterial.

(ii) it was no answer to the claim in respect of neurosis that she could avoid the pain by not doing certain things. The fact that she was prevented by the disease from doing those things was a reason for awarding damages.

[EDITORIAL NOTE. In some employments the employees live in, that is to say, their wages are less by reason of the fact that they receive their board and lodging in lieu of part of their wages. It is beyond question that in an ordinary running-down case the damages will include a claim for loss of salary, and in the present case it is held that that claim will include a sum for the loss of board and lodging. Such a claim is not defeated by the fact that the plaintiff has, since the accident, received free board and lodging at her own home. The position arising where an accident causes neurosis is one of great difficulty and the consideration here given to some of its aspects in the judgment of SLESSER, L.J., is of great importance.

AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 722-732, paras. 1013-1025; and FOR CASES, see DIGEST, Vol. 36, pp. 125-127, Nos. 831-842.]

Case referred to:

(1) *Banco de Portugal* v. *Waterlow & Sons, Ltd., Waterlow & Sons, Ltd.* v. *Banco de Portugal*, [1932] A.C. 452; Digest Supp.; 101 L.J.K.B. 417; 147 L.T. 101.

APPEAL by the plaintiff from a judgment of STABLE, J., delivered in the King's Bench Division on Oct. 6, 1939, and cross-appeal by the defendant. The plaintiff, a young girl, was injured through the negligent driving by the defendant's servant of a taxicab in which she was travelling. The judge awarded her £455 special damages, £400 general damages for disfigurement of the face, fright and shock, and £300 general damages for traumatic neurosis. The appeal was brought by the plaintiff on the ground that the damages awarded for the neurosis were not sufficient. In dealing with this matter in his judgment, the judge said that the plaintiff impressed him as a young woman who during the last 3 years had had one major preoccupation in life—namely, how ill she was. He said: "I am satisfied that, in the surroundings in which she has been placed, she has not been able to work for 3 years, not because there is anything the matter with her at all, except for this neurosis, but, if she could only persuade herself that she could, I am quite satisfied that she would be working and living a perfectly normal life within a couple of months of this action . . . I am equally satisfied that, if she had made a resolute effort, or if someone had made it for her, to get back to the normal active life of a normal active young woman, and if the circumstances were such that she was compelled to do so, there was nothing in the world to prevent it." Dealing with the quantum of damages, the judge said: "I do not think that the plaintiff has suffered much during the last 3 years. I think that she has felt this pain. I do not think that she has invented that, and I think that she has perfectly persuaded herself, and honestly persuaded herself, that every time she does something a little energetic it hurts, but, when she does something else, because the pain is really in her mind, it stops aching. I think she has derived a certain amount of enjoyment from contemplating the peculiar sort of existence which she has elected to live." In her claim for special damage the plaintiff included loss of wages at £1 per week continuing, and loss of board and lodging at 25*s.* per week continuing. At the time of the accident, she was employed at a hotel at Sevenoaks, and received board and lodging as part of her wages. After the accident, she went to live with her father, who was not a party to the action. For board and lodging the judge allowed her nothing. He found no evidence of any agreement that the daughter should pay the father anything, and said that it would be grossly improper for him to imply the existence of a contract which he knew was never contemplated.

Gilbert Beyfus, K.C., and *Alan Bell* (for *D. M. Wilson* on war service) for the appellant.

Serjeant Sullivan, K.C., and *F. W. Beney* for the respondent.

Slesser, L.J.: This case has been given anxious consideration by the court, and we have had the advantage of a very full argument by counsel on each side, for which the court is very much indebted. Lillian Mary Liffen, a young girl at the time of the accident, was seriously injured as the result of a taxicab, as it was said, being negligently driven on Dec. 25, 1936. The cab skidded and collided with a post, and the girl, as I have said, undoubtedly sustained serious injuries at that time.

It is not necessary at this stage to discuss the liability of the defendant. That was disputed, but the matter has been considered and tried, and the judge found that the defendant, John Watson, was liable to the plaintiff for the damage which she sustained as the result of negligence. There is no appeal with regard to that matter.

A The appeal is brought before this court upon the judge's estimation of the damages, which are said, in the circumstances, to be insufficient. The judge has given judgment for the sum of £1,155 with costs, and he has, as he says, with a view to a possible appeal, told this court how he has arrived at that figure. Part of that figure is to be attributed to
B special damages and part to general damages. I propose to confine my remarks for the moment to the general damages which the judge has assessed. He has assessed the general damages at the sum of £700, and, as to £400 of those damages, as he says in his judgment, he deals with it on a different basis from that of the remaining £300. There was a cross-
C appeal with regard to the £400, which is another matter which I will mention. It is said that the £400 which the judge gave in respect of the scars on the face should be reduced. In fact, the £400 was not limited to the scars on the face. The judge took other matters into consideration in awarding the £400, such as shock and other matters.
D However, with that, so far as the appeal is concerned, we are not immediately concerned.

The appeal is limited to a complaint with regard to the £300 which is said to have been given upon an erroneous estimate of the damages, the amount of which has been given. The judge states, in his judgment,
E the proper measure of compensation to be put forward with regard to this matter, and he has given us the benefit of the reasons as to why he has arrived at the figure of £300. As this court has come to the conclusion that in this case, as regards the whole question of damages, apart from the liability, which I have already said has been determined
F in the plaintiff's favour, there should be a new trial, I wish to refrain from expressing any opinion on the respective cases which were put forward for the plaintiff and for the defendant, more particularly through their doctors. In order to explain how the difficulty has arisen, however, I would simply say this. On behalf of the plaintiff, who had
G suffered this injury, it was said that, after being treated and returned to her home, she still suffered from pain after the accident, and decided to consult an eminent physician, Dr. Ernest Fletcher, on Oct. 6, 1937. She continued to be under his care for a very considerable period of time after that. The last report which was before the court on this
H matter is dated Sept. 26, 1939, and in it, after dealing with the plaintiff in very many different ways involving considerable and arduous treatment, her presence in hospital and various suggestions, he says at the end of his report: "I regret the result of the treatment has been so unsuccessful." Broadly speaking, it is enough for present purposes to say that Dr. Fletcher came to the conclusion that this plaintiff had

suffered a permanent organic injury as the result of this accident. However,
as there is to be a new trial, it is not necessary to say more than
that, apart from the disability being permanent or otherwise, the treatment
was unsuccessful, and the disability remained in greater or less
degree. On the other hand, evidence was given by two doctors, also
eminent, before the judge, each of whom examined the lady, but not A
on many occasions, and for the purposes of this case only. They were
not attending her for any curative purpose. Their evidence amounts
to this: "This lady is not malingering. We do not suggest that her
pains and disabilities of which she complains are not real in the sense
that she has invented them for the purposes of this action, or even for B
the purpose really"—although the judge seems rather to hover on this
point—" of self-indulgence." As the result of this accident, she has a
neurosis, and she has pains, which, though they are not caused by any
organic trouble, yet are real, and, I suppose, to that extent they must
be regarded, as those two doctors say, as actual pain, which, it may C
well be, will not trouble her if she carefully restricts her occupation,
but which at the present time do trouble her, and they do not deny
that fact. The judge has come to the conclusion that the evidence
on this principle issue between the doctors is conflicting, as, indeed, it
must be, and that he prefers the evidence of the doctors on behalf of D
the defendant. He comes to the conclusion that this plaintiff was not,
at the material time, suffering from any organic trouble, that such trouble
had long since cleared up, and that the treatment she had received was,
therefore, based upon an erroneous assumption as to her physical
condition, and that she was in the condition in which she was at the time E
of the trial as the result of a neurosis. However, in so far as we think that
there should be a new trial in this case, for reasons which I will explain
in a moment, I do not express any opinion as to which version of this
lady's misfortune is to be believed. The judge who will hear the new
trial will again have to consider this and any other evidence which the F
parties may wish to call before him, and he will again have to come to
a conclusion, as did STABLE, J., as to whether the true view is that this
plaintiff's condition is neurotic or organic. The reason why we think that
there should be a new trial, however, is not because the judge has found
that the evidence of the defendant's doctors was to be preferred, nor G
because he has to some extent relied upon the demeanour of the plaintiff
herself in the witness-box as the reason for his coming to the conclusion
that her condition was neurotic. The reason why we think that there
should be a new trial is that, having come to the conclusion that the
condition was neurotic, he allowed considerations to enter into his H
mind which we think, with every respect, must have affected his estimation
of the damage which she had suffered in his opinion, and without
which it might well be that he would have given her more, possibly
considerably more, than £300 upon this head. The two most objectionable—if
I may use the word with every respect—elements in the judg-

ment, on the assumption that the lady was suffering from neurosis, were these. First of all, he says:

> There is nothing the matter with her at all except this neurosis.

On that point I have already commented. Then he says:

> A . . . but, if she could only persuade herself that she could, I am quite satisfied that she would be working and living a perfectly normal life within a couple of months of this action.

It is not necessary at this stage to review the evidence. It is sufficient to say that neither Major Macmyn nor Mr. Morley, giving evidence on this matter, support any such conclusion. I quite agree with counsel B for the respondent that, when the judge says "a couple of months," one is not to treat that as an isolated phrase and say there is no evidence of that. I accept entirely his invitation to treat the words "within a couple of months" as being synonymous with the words "within a short time." That is quite clear. I find no evidence that the plaintiff, C who, in the estimation of these doctors, was genuinely suffering from this neurosis, would recover within a short time. Major Macmyn was asked:

> As soon as this case is over, what do you anticipate will be the effect upon this woman's symptoms?

D His answer was:

> I should anticipate a very material improvement, provided, of course, every encouragement is given.

That is a very vague basis upon which to assume that she will recover within two months of the accident. Mr. Morley was asked: "When E the case is over, will that neurosis continue?" His answer is:

> It is very much less likely to continue, although it depends upon how long the suggestion is forced into her. If she goes on having treatment, which is not necessary, it may do. If she gives up treatment, and makes an effort to get back to work, it will cease.

F There is no basis which I can discover for saying that she is capable of making an effort to go back to work at once. The very complaint from which she suffers—namely, the neurosis—may itself prevent her from making that effort which Mr. Morley thinks is necessary in order to make the disability cease. It seems to me to beg the question to say G that she will recover if she makes an effort, if part of the neurosis be that she feels she cannot make the effort. All these matters have to be very carefully weighed and considered, and I do not think it is right, upon the evidence given—and there is no other evidence on this point—to say that she "will probably recover within a very short H time" or "within a couple of months."

The other matter, which equally, I think, is unsupported by evidence, and which probably affects the damages, is this. The judge says in his judgment:

> On one aspect of the matter you might say the alteration in her outlook (but now she really prefers to do nothing except think about this pain) is a matter for which

> I ought to award heavy damages. I think not. I do not think that the plaintiff has suffered much during the last 3 years [which brings us back almost to the day of the accident]. I think that she has felt this pain. I do not think that she has invented that, and I think that she has perfectly persuaded herself, and honestly persuaded herself, that every time she does something a little energetic it hurts, but, when she thinks about something else, because the pain is really in her mind, it stops aching. I think she has derived a certain amount of enjoyment from contemplating the peculiar sort of existence which she has elected to live.

First of all, I would say that there is no evidence whatever that this plaintiff has not suffered much during the last 3 years, and there is a considerable body of evidence recorded by the various reports of Dr. Fletcher—who, whether he be accepted or not in his medical prognosis, at any rate, may, I think, be regarded as the only evidence as to the plaintiff's condition of pain—that she was suffering from continuous pain. Counsel for the defendant argues, as I understood his argument, that, the pain being neurotic, and not organic, if the plaintiff does not attempt to do the things which give her pain, or indulge in that particular kind of activity, then she will not suffer the pain. However, that seems to me to be the dilemma with which counsel for the defendant is faced. If the plaintiff can avoid the pain by not doing certain normal things, then she has been damaged, because she cannot do them. Conversely, if she attempts them and she feels pain, then I do not know on what basis it is said that that pain does not cause much suffering. I can see no evidence on this head at all. However, it is obvious that, if the true conclusion is that she has suffered much pain for 3 years, she will be entitled to more damages than she would be on the view that she had suffered very little pain. I think that that matter can be determined conclusively by merely saying that she is neurotic.

There is still the question of damages which would compensate her for this condition of neurosis into which admittedly the accident has thrown her. I wish to conclude by saying what I said in the beginning—namely, that, in the opinion of this court, if there is to be a new trial, it is not to be assumed that this court has decided that the question as to whether this plaintiff's disability is neurotic or organic is not fully open on the new trial. At the new trial, it will be open to the plaintiff again to persuade the tribunal that her injuries are organic, and not neurotic.

There is one other matter which I wish to mention, and that is this. The matters raised in the cross-appeal will, of course, equally be open at the new trial, but there is one thing which arises in the cross-appeal upon which, I think, an opinion may now be expressed. It is said that this plaintiff has suffered special damage by reason of the fact that she was, at the time of the accident, employed as a maid at a hotel, the Black Boy, in Bank Street, Sevenoaks, and it is said that she there received a weekly wage of £1, plus board and lodging to the value of 25*s*. per week. Dealing with that matter, the judge has allowed her the wage which she has lost as special damages, but has allowed her nothing in respect of the board and lodging. The monetary

value of the board and lodging I will not discuss, because it is a matter which will have to be estimated on a new trial. However, if the judge at the new trial does come to the conclusion that this plaintiff's contract was that she was to be paid a certain amount in cash and a certain amount in kind—a kind of payment which is expressly excepted from
A the Truck Acts in the case of a domestic servant—then I see no reason why, in estimating the damage, the loss in kind should not stand upon the same footing as the loss in cash, and, if it be that the father has, of his charity, or of his paternal piety, provided the plaintiff with board and lodging after the accident, that is no reason why she should not
B be heard to say that that loss in kind under the contract is as much a loss as it would have been if she had lost an actual sum in money.

It is said that there is no authority upon this matter. I do not want to discuss authorities, but I think that *Banco de Portugal* v. *Waterlow & Sons, Ltd.* (1), in the House of Lords, establishes as a general principle
C that, where a wrongdoer causes damage, all the damage which naturally flows from the wrongdoing is to be recompensed to the plaintiff, according to ordinary principles. In my opinion, therefore, there should be a new trial in this case, and the whole of the question of the damages, as distinct from liabilities, should be open to both sides to be ascertained
D on the new trial. The appeal will be allowed, with costs.

LUXMOORE, L.J.: I am in entire agreement with the judgment which has just been delivered by SLESSER, L.J.

E GODDARD, L.J.: I agree, and I only desire to add a few words. The judge, as I understand it, disallowed anything in respect of the board and lodging. Whether or not the plaintiff is entitled to recover the value of her board and lodging does not depend upon whether or not she made a contract with somebody else to give her board and
F lodging. She lost the board and lodging because she was put out of work by reason of this accident. She lost her wages and she lost her board and lodging. It does not matter in the least whether she is taken in by her father or whether she is taken in by a friend. It might very well be in this sort of case that a woman in this position might say
G to a friend of hers: "I cannot make a contract with you to pay you, but if I get damages, I shall pay you something towards the cost of my board and lodging." However, those are considerations which are really immaterial. The only consideration is, what has she lost? She has lost the value of her board and lodging, just the same
H as she has lost her wages. Therefore, she is entitled to be compensated for that loss. What she does with the compensation when she gets it is a matter for her, and not for anybody else. If she likes to pay her father, she can, and whether or not her father has any claim against her I do not know. However, she is entitled to recover the value of her board and lodging. I have often heard the point raised before,

and I think it just as well that it should be cleared up, and that the law upon the point should be stated.

Appeal allowed with costs.

Solicitors : *Herbert G. Greenwood* (for the appellant) ; *A. E. Wyeth & Co.* (for the respondent). A

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

LETHBRIDGE IRRIGATION DISTRICT TRUSTEES *v.* INDEPENDENT ORDER OF FORESTERS AND ATTORNEY-GENERAL FOR CANADA. B

R. *v.* INDEPENDENT ORDER OF FORESTERS AND ATTORNEY-GENERAL FOR CANADA.

[PRIVY COUNCIL (Viscount Caldecote, L.C., Viscount Sankey, Viscount Maugham, Lord Roche and Lord Porter), **December 11, 12, 13, 14, 1939, March 4, 1940.]** C

Privy Council—Alberta—Constitutional law—Conflict between dominion and provincial legislation—Interest—Reduction of interest on provincially guaranteed securities—British North America Act, 1867 (c. 3), *ss.* 91, 92—*Canadian Interpretation Act* (*R.S.C., c.* 1), *s.* 16—*Interest Act* (*Canada*) (*R.S.C., c.* 102)—*Provincially Guaranteed Securities Proceedings Act* (*Alberta*), 1937 (*c.* 11)—*Provincial Guaranteed Securities Interest Act* (*Alberta*), 1937 (c. 12)—*Provincial Securities Interest Act* (*Alberta*), 1937 (*c.* 13). D

The Provincial Guaranteed Securities Interest Act (Alberta), 1937, in effect reduced the rate of interest payable in respect of securities guaranteed by the province. The Provincially Guaranteed Securities Proceedings Act (Alberta), 1937, enacted that no proceedings should be brought in respect of such interest, or in any way to enforce such security without the consent of the Lieutenant-Governor in Council. The Provincial Securities Interest Act (Alberta), 1937, similarly reduced the interest payable in respect of securities issued by the province :— E

HELD : (i) all three Acts were *ultra vires* in that in their true nature and character they dealt with interest within the meaning of the British North America Act, 1867, s. 91 (19). F

(ii) all the Acts were also *ultra vires* as conflicting with the dominion Interest Act (Canada), 1927.

[EDITORIAL NOTE. The Acts here in question, which, in effect, reduced the rates of interest payable on debentures of the province and public bodies within the province whose issues were guaranteed by the province, are held to be *ultra vires* as being in relation to a subject reserved to the dominion legislature by the British North America Act. G

AS TO FEDERAL AND PROVINCIAL RELATIONS IN CANADA, see HALSBURY, Hailsham Edn., Vol. 11, pp. 91-104, paras. 156-180 ; and FOR CASES, see DIGEST, Vol. 17, pp. 429-445, Nos. 99-180.]

Cases referred to : H

(1) *Great West Saddlery Co.* v. *R.*, [1921] 2 A.C. 91 ; 17 Digest 440, *168* ; 90 L.J.P.C. 102 ; 125 L.T. 136.

(2) *A.-G. for Canada* v. *A.-G. for British Columbia*, [1930] A.C. 111 ; Digest Supp. ; 99 L.J.P.C. 20 ; 142 L.T. 73.

(3) *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31 ; 17 Digest 429, *99* ; 63 L.J.P.C. 25 ; 69 L.T. 774.

(4) *Citizens Insurance Co. of Canada* v. *Parsons, Queen Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96 ; 17 Digest 436, *145* ; 51 L.J.P.C. 11 ; 45 L.T. 721.

(5) *Union Colliery Co. of British Columbia, Ltd.* v. *Bryden*, [1899] A.C. 580 ; 17 Digest 439, *159* ; 68 L.J.P.C. 118 ; 81 L.T. 277.

(6) *Ladore* v. *Bennett*, [1939] A.C. 468 ; [1939] 3 All E.R. 98 ; Digest Supp. ; 108 L.J.P.C. 69.

A (7) *Day* v. *Victoria (City)*, [1938] 3 W.W.R. 161.

(8) *A.-G. for British Columbia* v. *A.-G. for Canada, Re Farmers' Creditors Arrangement Act*, [1937] A.C. 391 ; Digest Supp. ; 106 L.J.P.C. 67 ; 156 L.T. 313.

(9) *Madden* v. *Nelson & Fort Sheppard Ry.*, [1899] A.C. 626 ; 17 Digest 438, *154* ; 68 L.J.P.C. 148 ; 81 L.T. 276.

B APPEALS from the Appellate Division of the Supreme Court of Alberta, who in each case dismissed the appeal of the present appellants from (i) a judgment of EWING, J., dated Oct. 29, 1937, and (ii) a judgment of SHEPHERD, J., dated Feb. 11, 1939. The facts and arguments are fully set out in the judgment of their Lordships delivered by VISCOUNT C CALDECOTE, L.C.

D. N. Pritt, K.C., and *W. S. Gray, K.C.*, for the appellants in both appeals.

G. H. Steer, K.C., *Frank Gahan* and *R. Bigelon* for the respondent in both appeals.

D *Frank Gahan* for the intervener, the Attorney-General of Canada, in both appeals.

VISCOUNT CALDECOTE, L.C. : These two appeals raise questions of the validity of three Acts of the legislative assembly of the province E of Alberta, all passed on Apr. 14, 1937. In the first appeal, the Alberta Provincial Guaranteed Securities Interest Act, 1937, and the Alberta Provincially Guaranteed Securities Proceedings Act, 1937, in so far as it relates to the subject-matter of the proceedings under appeal, have been declared *ultra vires* by the Appellate Division of the Supreme Court F of Alberta, dismissing an appeal from a judgment of EWING, J., dated Oct. 29, 1937. In the second case, the Alberta Provincial Securities Interest Act, 1937, has likewise been declared *ultra vires* the legislature of the province, as the result of a decision of the Appellate Division dismissing an appeal from a judgment of SHEPHERD, J., dated Feb. 11, G 1939. Similar questions arise in the two appeals as to the interpretation of the British North America Act, 1867, ss. 91, 92, and they were heard together. It is necessary now to deal with the two cases separately.

The respondent in the first appeal (the plaintiff in the action) is the holder of a number of debentures, dated May 21, 1921, each of the prin- H cipal sum of $1,000, issued by the first-named appellant and guaranteed by the province of Alberta. The debentures bore interest at the rate of 6 per cent. per annum payable half-yearly in gold coin of or equivalent to the standard of weight and fineness fixed for gold coins at the date of the debentures by the laws of the United States of America upon presentation and surrender of the coupons attached to the debentures, as the coupons severally became payable. The debentures provided that payment of interest should be made at the holder's option at the principal office of the Imperial Bank of Canada in Toronto, Montreal or Edmonton, or at the office of the Bank of Manhattan Co. in New York.

On Dec. 15, 1936, the respondent presented for payment at the A
Imperial Bank of Canada in Toronto coupons attached to the debentures and dated Nov. 1, 1936, for $30 each, being in respect of interest at the rate of 6 per cent. The bank, acting on the instructions of the government of the province of Alberta, refused payment of the amount of
the coupons except to an amount representing interest at the rate of B
3 per cent. The respondent thereupon took proceedings in the Supreme Court of Alberta to recover the full amount of the interest. The first-named appellant met the claim by relying on the provisions of the Alberta Provincial Securities Interest Act, 1936, reducing the interest
payable on the debentures from 6 per cent. to 3 per cent. and prohibiting C
any action from being brought or maintained in the courts of the province in respect of the debentures. At the trial of the action, the Act relied on by the first-named appellant was held by IVES, J., to be *ultra vires* the legislature, and judgment was given for the amount claimed. Notice
of appeal was given, but, before the appeal was heard, the two Acts D
in question in the present appeal were passed by the legislative assembly, and by the Alberta Provincial Securities Interest Act, 1937, s. 5, the Alberta Provincial Securities Interest Act, 1936, was repealed. A few days later, the appeal from the judgment of IVES, J., was abandoned.

On May 1, 1937, a further amount of interest became payable, and E
on May 11 the respondent presented the appropriate coupons for payment at the Imperial Bank of Canada in Toronto. The bank again, on the instructions of the government of the province of Alberta, refused payment of the full amount of the interest. The respondent thereupon
began the action out of which the present appeal arises to recover the F
interest due on the debentures. The first-named appellant in answer to the claim relied on the Alberta Provincial Guaranteed Securities Interest Act, 1937, by which the interest due at the rate of 6 per cent. was reduced to 3 per cent., and also on the Alberta Provincially Guaranteed
Securities Proceedings Act, 1937, as a bar to the action without the G
consent of the Lieutenant-Governor in Council. The question in this appeal is whether these two Acts are within the powers of the provincial legislature, having regard to the provisions of the British North America Act, 1867, ss. 91, 92, by which the distribution of legislative powers
between the Parliament of Canada and the provincial legislatures was H
made.

The Alberta Provincial Guaranteed Securities Interest Act, 1937, effects its object in simple and straightforward language. After defining guaranteed securities so as to include, *inter alia*, the debentures concerned in this appeal, the Act proceeds by sect. 3 to reduce the rate of

interest payable upon any guaranteed security from and after June 1, 1936, "notwithstanding any stipulation or agreement as to the rate of interest payable" in respect of the security. In order to bolt the door more firmly against a holder of any guaranteed security who might wish to test his rights in the courts of the province, it is provided by
A sect. 3 (2) that "no person shall be entitled to recover in respect of any guaranteed security any interest at a higher rate than the rate" prescribed by the Act, and the rights of the holder of a guaranteed security are stated to be such as are set out in the Act. The Alberta Provincially Guaranteed Securities Proceedings Act, 1937, carries the alteration of
B the rights of the debenture holder a little further. Sect. 2 defines "guaranteed securities" as in the Alberta Provincial Guaranteed Securities Interest Act, 1937. Sect. 3, which is the only operative section of the Act, prohibits any action or proceeding of any kind for the recovery of any money payable:

> C . . . in respect of any guaranteed security or for the purpose of enforcing any right or remedy whatsoever for the recovery of any such money or for the purpose of enforcing any judgment or order at any time heretofore or hereafter given or made with respect to any guaranteed security or for the purpose of enforcing any foreign judgment founded on a guaranteed security, without the consent of the Lieutenant-Governor in Council.

D The validity of these two Acts depends upon the interpretation and application of the British North America Act, 1867, ss. 91, 92. These sections have been the subject of repeated examination in the Judicial Committee, and there can no longer be any doubt as to the proper principles of their interpretation, difficult though they may be in application.
E VISCOUNT HALDANE, in delivering the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *R.* (1), said, at p. 116:

> The rule of construction is that general language in the heads of sect. 92 yields to particular expressions in sect. 91, where the latter are unambiguous.

In a later decision of the Judicial Committee, *A.-G. for Canada* v. *A.-G.*
F *for British Columbia* (2), at p. 118, LORD TOMLIN summarised in four propositions the result of the earlier decisions of the Board on questions of conflict between the dominion and the provincial legislatures. The first proposition is to the effect that the legislation of the parliament of the dominion, so long as it strictly relates to subjects of legislation
G expressly enumerated in sect. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by sect. 92. LORD TOMLIN referred to *Tennant* v. *Union Bank of Canada* (3) as the authority for this statement. In applying these principles, as their Lordships propose to do to the present case, an inquiry must first
H be made as to the "true nature and character of the enactments in question" (*Citizens Insurance Co. of Canada* v. *Parsons* (4)), or, to use the words of LORD WATSON in delivering the judgment of the Judicial Committee in *Union Colliery Co. of British Columbia, Ltd.* v. *Bryden* (5), as to their "pith and substance." Their Lordships now address themselves to that inquiry.

The long title of the Alberta Provincial Guaranteed Securities Interest Act, 1937, is:

> An Act respecting the interest payable on debentures or other securities guaranteed by the province.

The sole purpose and effect of the Act are to reduce the rate of interest on a number of securities. The holders of the securities affected by the Act were entitled, before the Act was passed, to receive interest at a rate according to the terms on which their securities were issued. The Act substituted a different rate of interest for the agreed rate. The Act clearly deals with interest, and "interest" is one of the classes of subject which by sect. 91 are reserved exclusively for the dominion legislature. Unless, therefore, a restricted interpretation is to be given to "interest" in sect. 91 (19), instead of its ordinary meaning, it would appear on a first examination that the Alberta Provincial Guaranteed Securities Interest Act, 1937, is not within the competence of the province. Their Lordships, however, were invited by counsel for the appellants to say that the inclusion of "interest" in the dominion subjects in sect. 91 is to be explained by the history of earlier legislation on the subject of usury, and that, therefore, the word "interest" must be read as meaning only interest which is exorbitant or usurious. This interpretation is open to the objection that, as no standard is laid down by which interest is to be adjudged exorbitant or usurious, the word "interest," standing, as it does in sect. 91, without any word of qualification or limitation, would seem a very uncertain description of a class of subject for the purpose of defining the exclusive legislative authority of the dominion. Their Lordships' attention was called to the Dominion Interest Act, 1927, s. 4, by which no interest exceeding the rate of 5 per cent. per annum shall be chargeable unless the contract contains an express statement of the yearly rate of interest. Legislation of this sort was said by counsel for the appellants to be akin to legislation dealing with usury. Their Lordships would be slow in forming this opinion, but, even if it were so, it carries the argument no further. The dominion parliament, in exercising the power to legislate upon "interest," might very well include, in an Act dealing generally with the subject of interest, provisions to prevent harsh transactions. Nor does the history of legislation in Canada on the subject of interest support the appellants' argument. Their Lordships' attention was called to a number of Canadian Acts of Parliament on the subject of usury from 1793 down to 1858. In 1858, an Act was passed by the Parliament of Canada (c. 85) which was the forerunner of the Canadian Interest Act, 1927. The Act of 1858 by sect. 2 in effect abolished restrictions as to rates of interest, except in the case of certain persons named in the Act. From that time forward, the usury laws, which the policy of an earlier generation demanded, ceased to have effect. Their Lordships are of opinion that, so far from supporting the argument for a restricted interpretation of sect. 91 (19) in order to confine it to usurious interest, the history of the usury laws in Canada destroys it. Their Lordships do not find it necessary to attempt to lay down any exhaustive definition of the word "interest." The word itself is in common use, and is well understood. It is sufficient to say that in its ordinary connotation it covers contractual interest, and contractual interest is the subject of the Act now in question.

For these reasons, their Lordships have come to the conclusion that the Alberta Provincial Guaranteed Securities Interest Act, 1937, is in pith and substance an Act dealing with interest within the meaning of the British North America Act, 1867, s. 91 (19). Having regard to this conclusion, it becomes unnecessary to discuss at length the classes of subjects enumerated in sect. 92 as being within the powers of provincial legislatures. It was suggested on behalf of the appellants that the Act in question is legislation concerning "municipal institutions in the province" (head 8), or concerning "property and civil rights in the province" (head 13), or, failing these, that the Act fell under head 16, "generally all matters of a merely local or private nature in the province." Their Lordships are unable to accept any of these contentions. In so far as the Act in question deals with matters assigned under any of these heads to the provincial legislatures, it still remains true to say that the pith and substance of the Act deals directly with interest, and only incidentally or indirectly with any of the classes of subjects enumerated in sect. 92. Even if it could be said that the Act relates to classes of subjects in sect. 92, as well as to one of the classes in sect. 91, this would not avail the appellants to protect the provincial Act against the Interest Act, 1927, passed by the Dominion Parliament the validity of which, in the view of their Lordships, is unquestionable. Sect. 2 of the Interest Act is as follows:

> Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.

This provision cannot be reconciled with the Alberta Provincial Guaranteed Securities Interest Act, 1937, and, as LORD TOMLIN made clear in *A.-G. for Canada* v. *A.-G. for British Columbia* (2), dominion legislation properly enacted under sect. 91 and already in the field must prevail in territory common to the two Parliaments.

Their Lordships were pressed with the decision of the Board in *Ladore* v. *Bennett* (6). In that case, a provincial legislature passed Acts amalgamating and incorporating in one city four municipalities which were in financial difficulties. As part of the consequent adjustment of the finances of the municipalities, debentures of the new city of equal nominal amount to those of the old municipalities were issued to the creditors, but with the rate of interest reduced. It was held by the Judicial Committee that a provincial legislature, which could dissolve a municipal corporation and create a new one to take its place, could legislate concerning the financial powers of the new corporation, and incidentally might define the amount of interest which the obligations incurred by the new city should bear. On this ground, it was decided that legislation directed *bona fide* to the creation and control of municipal institutions is in no way an encroachment upon the general exclusive power of the dominion legislation over interest. Having come to the conclusion that the pith and substance of the legislation in question related to one or more of the classes of subjects under sect. 92, the Board had no difficulty in holding that the regulation of the interest payable on the debentures of the new city was not an invasion of dominion powers under sect. 91 (19).

The decision of the Court of Appeal of British Columbia in *Day* v. *Victoria* (*City*) (7) holding the Victoria City Debt Refunding Act, 1937, *intra vires* of the provincial legislature was also cited as a case in which it was held permissible for a provincial legislature to pass an Act relating to interest. On examination, the decision is found to give no support to the appellants' argument. The Act there in question did not purport to be an Act relating generally to interest, and, while some of its provisions dealt with interest as an incident effecting the general object of the enactment, it was held—rightly, as their Lordships think—not to be an Act in relation to interest, or to conflict with the Dominion Interest Act. In *A.-G. for British Columbia* v. *A.-G. for Canada, Re Farmers' Creditors Arrangement Act* (8), which was also cited, the question was whether Acts of the Dominion Parliament dealing with the liabilities of farmers and with creditors' arrangements came under sect. 91 (21) of the British North America Act, "Bankruptcy and insolvency," or sect. 92 (13), "Property and civil rights in the province." The Judicial Committee held that the Acts in question related to "bankruptcy and insolvency." The case is one more illustration of the rule that, in resolving the questions which are bound to arise between these two famous sections of the British North America Act, it is essential first to examine the "true nature and character" of the legislation in question.

The Alberta Provincially Guaranteed Securities Proceedings Act, 1937, prohibiting actions or proceedings to enforce rights with respect to guaranteed securities without the consent of the Lieutenant-Governor in Council, must, in their Lordships' judgment, stand or fall with the Alberta Provincial Guaranteed Securities Interest Act, 1937. Each of the two Acts applies to "guaranteed securities" as defined in identical terms. The Acts are in fact designed to effect one and the same purpose —namely, to reduce the rate of interest on the securities to the level fixed by the Alberta Provincial Guaranteed Securities Interest Act, 1937. If the Alberta Provincially Guaranteed Securities Proceedings Act, 1937, can properly be passed as relating to one or other of the classes of subjects in sect. 92, it enables the government of Alberta, acting through the Lieutenant-Governor in Council, to allow proceedings in the courts to recover interest at the rate which the government fix, but at no higher rate. By this method, reductions in the rate of interest on the guaranteed securities would be enforceable, regardless of the fate of the Alberta Provincial Guaranteed Securities Interest Act, 1937. In other words, the Alberta Provincially Guaranteed Securities Proceedings Act, 1937, is an attempt to do by indirect means something which A their Lordships are satisfied the provincial Parliament cannot do. This Board has never allowed such colourable devices to defeat the provisions of sects. 91 and 92. Reference may be made to the statement of the EARL OF HALSBURY, L.C., in delivering the decision of the Judicial Committee in *Madden* v. *Nelson & Fort Sheppard Ry.* (9), at p. 627:

> B . . . it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly.

The substance, and not the form, of the enactment in question must be regarded. Their Lordships cannot come to any other conclusion than that, under colour of an Act relating to the class of subject described C in sect. 92 (14), the provincial Parliament have passed legislation which is beyond their powers. In the result, their Lordships agree with the judgments of EWING, J., and of the majority of the Appellate Division of the Supreme Court of Alberta, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

D The question in the second appeal is whether the Alberta Provincial Securities Interest Act, 1937, is within the powers of the Alberta legislature. The respondent began the proceedings by way of petition claiming that the Act is *ultra vires* the Alberta legislature and asking for a declaration of the court accordingly. The respondent is a body E corporate in accordance with the law of the province, and owns a number of debentures to the amount of $373,000, lawfully issued by the province under powers conferred on the province by statutes of Alberta and orders of the Lieutenant-Governor in Council. The debentures, which were issued at different dates, bear dates of interest varying according F to the conditions of the several debentures. The respondent, on presenting interest coupons from time to time, has been refused payment of interest by the defendant at the agreed rates. The defendant relied on, and now pleads, the provisions of the Alberta Provincial Securities Interest Act, 1937, entitled:

> G An Act respecting the interest payable on debentures and other securities of the province.

The Act applies to all debentures theretofore issued by the province. Sect. 3 (1) of the Act provides as follows:

> Notwithstanding any stipulation or agreement as to the rate of interest payable H in respect of any security, on, from and after June 1, 1936, the rate at which interest shall be payable in respect of any security shall be as follows . . .

The new rates are then set out, and in general they are half the agreed rates. Sect. 3 (2) declares the rights of holders of the debentures of the province covered by the Act to be those set out in the Act. These two subsections are the whole Act, apart from a section protecting trustees or fiduciaries, and another section repealing the Act of the previous session of which the short title was the Provincial Securities Interest Act, 1936.

Their Lordships have considered the Act with a view to ascertaining its "true nature and character," or "its pith and substance." It relates in substance, not to borrowing, but to payment of interest in respect of existing debentures and other securities at less than the contract rates. The appellants made submissions similar to those presented in the first appeal, and their Lordships, without repeating the reasons already given in deciding the first appeal, take the same view of this Act as of the Alberta Provincially Guaranteed Securities Proceedings Act, 1937, and the Alberta Provincial Guaranteed Securities Interest Act, 1937. Their Lordships were invited to hold that the Alberta Provincial Securities Interest Act, 1937, could be justified by reference to sect. 92 (3), "the borrowing of money on the sole credit of the province." The argument, in their Lordships' view, is not well-founded, on the facts of this case, and fails by reason of their view that in pith and substance this Act relates to "interest."

The appellant submitted one other argument with which it is necessary to deal. It was said that the position of the Crown is not touched by the Canadian Interest Act, s. 2, by reason of the provisions of the Canadian Interpretation Act, s. 16, which enshrines the doctrine that the Crown is not bound by any Act unless it is expressly mentioned therein. The argument could only be relevant on the assumption that the Alberta Provincial Securities Interest Act, 1937, would be valid but for the fact that it conflicts with the Dominion Interest Act. Their Lordships, however, take the view that the provincial Act is *ultra vires* on the ground that its pith and substance relate to interest. If it were necessary to deal with the appellants' submission that the Crown is not bound by the Interest Act, their Lordships would be content to adopt the judgment on this point of SHEPHERD, J. Their Lordships will humbly advise His Majesty that this appeal also should be dismissed. The appellants will pay the respondent's costs.

Appeals dismissed with costs.

Solicitors: *Blake & Redden* (for the appellants in both appeals); *Charles Russell & Co.* (for the respondent and the intervener in both appeals).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

NOTE.

An appeal in *Newman* v. *Real Estate Debenture Corpn. and Flower Decorations, Ltd.*, has been settled.

R. *v.* BARNES. R. *v.* RICHARDS.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Hilbery and Hallett, JJ.), **January 22, 23, 1940.**]

Criminal Law—Accomplice—Corroboration—Evidence of fellow prisoners inculpating accused but not called by prosecution—What persons are accomplices.

Criminal Law—Separate trials—Discretion of judge.

The appellants were indicted, together with three other persons, a man and two women, for the murder of one A., and were convicted and sentenced to death. They had all been concerned in the preparation, the placing and the explosion of a bomb which had been left on a carrier-cycle outside a shop in the main business street of C. on Aug. 25, 1939. In consequence of the explosion 5 persons were killed, including A. Each of the two women made a number of statements, the earlier ones having reference to their own conduct only, while the later ones inculpated the two appellants. The judge pointed out differences between the evidence of the women given at the trial, and the earlier statements made by them. He told the jury that their evidence was evidence against themselves only, but he made no reference to the fact that their evidence was that of accomplices and might need corroboration. The appellants appealed on the grounds (i) that they should have been tried separately, and (ii) that the judge in his summing up had (*inter alia*) failed to warn the jury not to accept the evidence of the two women prisoners without corroboration :—

HELD : (i) the question whether there should be separate trials is a question for the discretion of the judge. There was no ground here for the contention that it was necessary for the administration of justice that the trials should be separated.

(ii) as the evidence of the women prisoners was not evidence called by the prosecution, nor was the jury asked by the prosecution to act upon it, the necessity for a warning with regard to the evidence of accomplices did not arise.

[**EDITORIAL NOTE.** The necessity for corroboration of the evidence of accomplices applies only in the case of evidence called by the prosecution. Where accomplices are called by the defence and the jury are not asked by the prosecution to act upon their evidence, there is no need for such corroboration.

AS TO CORROBORATION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 222-224, paras. 309-313 ; and FOR CASES, see DIGEST, Vol. 14, pp. 460-467, Nos. 4887-4972.]

Cases referred to :

(1) *R. v. Baskerville,* [1916] 2 K.B. 658 ; 14 Digest 463, *4934* ; 86 L.J.K.B. 28 ; 115 L.T. 453 ; 12 Cr. App. Rep. 81.

(2) *R.* v. *Martin* (1910), 5 Cr. App. Rep. 4 ; 14 Digest 456, *4827.*

(3) *R.* v. *Bywaters* (1922), 17 Cr. App. Rep. 66 ; 14 Digest 501, *5519.*

(4) *R.* v. *Tate,* [1908] 2 K.B. 680 ; 14 Digest 535, *6064* ; 77 L.J.K.B. 1043 ; 99 L.T. 620 ; 1 Cr. App. Rep. 39.

APPEALS against convictions for murder at the Birmingham Assizes on Dec. 14, 1939. The appellants, with three other persons, were indicted for the murder of Elsie Ansell, and were convicted and sentenced to death. The grounds of appeal were (i) that the appellants should have been tried separately, and (ii) that the summing up was insufficient in certain respects, the only objection material for the purposes of this report being that the judge failed to warn the jury not to accept the evidence of two fellow-prisoners without corroboration.

The appellants, together with other persons, were concerned in the preparation, the placing and the explosion of a bomb which was left on a carrier-cycle outside a shop in the main business street of Coventry on Friday, Aug. 25, 1939. In consequence of the explosion, five persons were killed, including Elsie Ansell. The appellants, with another man and two women, were indicted for the murder of Elsie Ansell. Each of the two women had made a number of statements, the earlier ones having reference to their own conduct only, while the later ones inculpated the two appellants, and more particularly the appellant Barnes. In particular, these statements referred to the purchase of certain sacks of a particular kind which were used in the preparation of a bomb. In his summing up, the judge pointed out the differences between the evidence of the women given at the trial and the earlier statements made by them, and told the jury that their evidence was evidence against themselves only. He made no reference to the fact that the evidence of these women was the evidence of accomplices, and thus might require corroboration.

R. A. Wood and *Douglas Jenkins* for the appellants.

Richard O'Sullivan, K.C., and *Arthur Wood* for the Crown.

Wood : The statements by the women incriminated the appellants, and that is a good ground for a separate trial : *R.* v. *Bywaters* (3). The evidence of these women, being accomplices, required corroboration.

O'Sullivan, K.C. : The omission by the judge to warn the jury of the necessity for corroboration does not render it essential that the conviction shall be quashed. If there is in fact corroboration, the court will allow the conviction to stand : *R.* v. *Tate* (4). By acquitting the women, the jury have found that they were not accomplices. The necessity to warn the jury arises only in cases where such evidence is given by the prosecution.

Lord Hewart, L.C.J. [delivering the judgment of the court] : The summing up in this case was of considerable length. In the transcript of the shorthand note, it fills about 50 pages, and it is to be observed that in that summing up, from first to last, neither the word " accomplice " nor the word " corroboration " is to be found. It was made clear in the course of the argument before us that there was a similar state of affairs in the speeches made at the trial. It is common ground that the speeches made by counsel for the various defendants never referred to the topic of corroboration or to the topic of complicity. That seems to us to be an interesting fact, and not without significance in this case, because of the two grounds of appeal which have been urged. One of them is the contention that the judge failed to direct the jury that the evidence of the two women jointly charged with the appellants required corroboration.

The first ground of appeal which was developed by counsel for the appellants in his very careful argument was that, in the circumstances of this case, there ought to have been, and there was not, a separate trial of each of the two appellants. His argument was that the statements which had been made by the women prisoners were statements which had the effect of inculpating some, at least, of the appellants, and that, in view of that fact, there was a duty upon the judge to order separate trials.

With regard to the law upon that point, there is no longer any room for doubt or difference. The question whether there should be separate trials is a question for the discretion of the judge. He exercised his discretion in this case. He heard argument, and he acted after the argument had been heard. In our view, there is no ground here for the contention that it was necessary for the administration of justice that the trials should be separated.

Much stress was laid yesterday by counsel for the appellants upon a passage in a case in this court, in which it was said that, where the defence of one prisoner incriminates another prisoner, there ought to be separate trials. However, if that passage is carefully read—it is not necessary to read it again—it is quite obvious that what is meant is that, where it appears that the essential part, or an essential part, of one prisoner's defence is, or amounts to, an attack upon another prisoner, then a separate trial should take place. In our opinion, it is idle to contend in this case that it was of the essence of the evidence, or, the statements of the other prisoners, to attack either of the appellants. It is quite obvious, when one reads that evidence and those statements, that what those witnesses were concerned with was to excuse themselves, and not to attack others. The mere fact that, in the course of excusing themselves, they made observations which might have the effect of throwing blame upon others who were in the dock is no sufficient reason why the trials should be separated. Apparently, the contention is that the judge, exercising a kind of prophetic power, is to perceive in advance that the effect of the evidence, if given by one prisoner, may inculpate another, and that, in all cases where that may happen, it is the duty of the judge to order a separate trial. That is not a correct statement of the position, and, in our opinion, there was no sufficient reason in this case for ordering separate trials, and there is no ground for the contention that this conviction cannot be supported for the reason that separate trials were not had.

The other grounds of appeal, numerous as they are, are really reducible to two classes, and to two classes only. There are those grounds which are mere errors of fact, mere misstatements, or are immaterial. There is also the ground, which has been developed at some length in the course of the argument, that in this case there ought to have been a direction to the jury that the evidence of the two women prisoners required corroboration. That is really the main point of the argument of counsel for the appellant. It is interesting to observe that nobody at the trial took any such point. It appears to be an afterthought, following a study of what then took place. If it were sound, of course, the mere fact that it was an afterthought would be immaterial, but one cannot help thinking that there is some confusion of thought in the contention that in this case it was the duty of the judge to direct the jury that here they were dealing with the evidence of accomplices, and that that evidence must not be accepted in the absence of corroboration. A

The witnesses whose evidence, it is said, needed corroboration are the two women prisoners. They were not called as witnesses for the prosecution. They went into the witness-box to give evidence, and they gave evidence on their own behalf. The rule with regard to corroboration of accomplices does not seem to apply to such a case. As was stated in B *R.* v. *Baskerville* (1) in this court, at p. 665:

> The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. C

In no respect is it true to say that the evidence which is referred to in this part of the notice of appeal was evidence called by the prosecution. Nor was the jury being asked by the prosecution to act upon the evidence given by either of those two women. One looks in vain for any case in D which it has been decided that, where prisoners are tried together on the charge of being jointly concerned in the commission of a crime, and they elect to give evidence, and in so doing one of them happens incidentally to give a piece of evidence which tells against another of the accused, it is requisite that the warning as to the evidence of accomplices should be given. E

Our attention was directed to *R.* v. *Martin* (2), which seems to throw useful light upon this part of the argument of counsel for the appellant. In that case, this court said, at p. 6:

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> . . . Johnson made a statement which implicated Martin to a certain extent, and which Martin did not contradict; he merely said he wished to reserve his evidence. The case was essentially one for the jury, and there was no want of direction which could have led to any miscarriage of justice.

In the opinion of this court, on the facts of this case, and upon the evidence in this case, the necessity for a warning with regard to the G evidence of accomplices did not arise. Even if it had arisen, it is manifest that, on the mass of evidence which was before the jury, there was ample and cogent evidence which made it clear what the verdict ought to be. There was ample evidence, apart from that evidence which is said—wrongly, as it appears to us—to have required corroboration on H the facts of this case. The summing up of the judge, which occupies undoubtedly a good deal of space in the transcript of the shorthand note, was careful, systematic and full, and, in our opinion, there is no ground for the contention that the summing up was defective in any of the respects referred to in the grounds of appeal. In our view, there is no ground at all, in this case, for the application which has been made or the appeal which has been urged, and the appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *W. J. Mealand* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re CLAYTON, COLLINS *v.* CLAYTON AND OTHERS.

[CHANCERY DIVISION (Morton, J.), **March 12, 1940.**]

Solicitors—Costs—Statutory lien or charging order—Property sold in administration action—Proceeds paid into court—Extent of charge—Whether order limited to costs incurred in recovery of property—Solicitors Act, 1932 (*c.* 37), *s.* 69.

The applicants were solicitors acting on behalf of the defendants in an administration action. In the course of that action, certain property was sold by them and the proceeds of sale were paid into court. The applicants asked for an order charging all their costs in the administration action upon the money in court, but it was contended that the charging order should be limited to the costs properly incurred in recovering and preserving the money in court:—

HELD: the charging order should be limited to the costs properly incurred in recovering and preserving the money in court.

[EDITORIAL NOTE. Some doubt appears to have arisen as to the extent of the lien under the Solicitors Act, 1932, s. 69. While the decision would seem to follow what has generally been considered as the correct view, the matter is now put beyond any doubt.

AS TO STATUTORY LIEN AND CHARGING ORDERS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 252-261, paras. 275-282; and FOR CASES, see DIGEST, Vol. 42, pp. 290-298, Nos. 3250-3318.]

Cases referred to:

(1) *Re Born, Curnock* v. *Born,* [1900] 2 Ch. 433; 42 Digest 299, *3327*; 69 L.J.Ch. 669; 83 L.T. 51.

(2) *Greer* v. *Young* (1883), 24 Ch.D. 545; 42 Digest 291, *3267*; 52 L.J.Ch. 915; 49 L.T. 224.

(3) *Emden* v. *Carte* (1881), 19 Ch.D. 311; 42 Digest 297, *3315*; 51 L.J.Ch. 371; 45 L.T. 328.

(4) *Turnbull* v. *Richardson* (1885), 1 T.L.R. 244; 42 Digest 296, *3299.*

(5) *Scholey* v. *Peck,* [1893] 1 Ch. 709; 42 Digest 303, *3371*; 62 L.J.Ch. 658; 68 L.T. 118.

(6) *Charlton* v. *Charlton* (1883), 52 L.J.Ch. 971; 42 Digest 292, *3270*; 49 L.T. 267.

(7) *Re John Clayton, Ltd.* (1905), 92 L.T. 223; 42 Digest 296, *3306.*

(8) *Re Knight, Knight* v. *Gardner,* [1892] 2 Ch. 368; 42 Digest 308, *3436*; 61 L.J.Ch. 399; 66 L.T. 646.

(9) *Mackenzie* v. *Mackintosh* (1891), 64 L.T. 706; 42 Digest 273, *3069.*

APPLICATION by the solicitors for the defendants in an administration action for a charge in respect of their costs of the action upon a fund in court, being the proceeds of sale of real property sold under an order in the action. The facts are fully set out in the judgment.

G. G. Solomon for the applicants.

J. H. Stamp for the Inland Revenue Commissioners.

J. F. Bowyer for the respondent.

Morton, J.: Arthur Victor Clayton died intestate on Nov. 28, 1933, and on Jan. 16, 1934, letters of administration were issued to the defendants, Jane Elizabeth Clayton and Wilfred Albert Reade. The intestate was a builder and estate agent, and he owned a number of properties. There were no fewer than 50 mortgages subsisting on these properties at the time of his death. On June 26, 1935, the plaintiff in this action, Mrs. Collins, issued an originating summons for administration of the estate, she being, I understand, the second mortgagee, and on Oct. 25, 1935, an order for administration was made.

The applicants on this summons, a firm of solicitors named Messrs. Savage Cooper & Wright, acted throughout the proceedings for the defendants, the administrators of the estate. Of the 50 properties which were the subject of mortgages I am told that 49 were sold by the mortgagees. No balance accrued to the estate from these sales, but there was a property called Oakdene, and in regard to that property a conditional contract was entered into by the defendants on Dec. 18, 1935, for its sale at the price of £2,650. By an order of Jan. 29, 1936, that contract, with a certain immaterial variation, was ordered to be performed. It was ordered that the defendant Jane Elizabeth Clayton and Messrs. Savage Cooper and Wright should respectively lodge in court as directed in the schedule to the order certain deposits received by them, the facts being that Mrs. Clayton had received £50, part of the deposit, while Messrs. Savage Cooper & Wright had received £215. It was further ordered as follows:

> That the defendants be at liberty to receive the balance of the purchase money payable upon the completion of the said sale, and after payment thereout to the said Halifax Building Society of the amount due to such society in discharge of principal interest, costs and other moneys secured by a mortgage dated Mar. 24, 1930, and made between the above-named intestate of the one part and the said Halifax Building Society of the other part and being a first charge upon the property described in the said conditional contract and do lodge in court to the credit of this action . . . the said balance of purchase money.

The sale was duly carried out in Mar., 1936. The applicants in the present application acted as solicitors for the vendors, having procured the mortgagees to consent to the sale. The two deposits of £50 and £215, and also a sum of £756 5*s.* 1*d.*, the balance of the purchase money after discharging the sums due to the mortgagees, were paid into court to the credit of the account. The funds in court now standing to the credit of the action are £18 11*s.* cash, which I understand represents interest accrued on war stock, £265 money on deposit, and £812 16*s.* 5*d.* 3½ per cent. war stock.

There is a stop in favour of the Inland Revenue for income tax. The applicants have so far had no costs paid to them in the action, which has not yet proceeded to further consideration, and, if they had to look to their clients personally for their costs, according to the evidence before me, they would be unlikely to obtain the costs from them. In those circumstances, the applicants ask that it may be declared that they are entitled to a charge upon the funds in court, to put it shortly, as being property recovered or preserved in this action through the instrumentality of the applicants for the amount of the taxed costs, charges and expenses of the applicants of or in reference to this action as the solicitors of the defendants in this action, down to and including the order to be made in this application. It will be observed that the claim for a charge is not limited to the costs properly incurred in recovering or preserving the property—namely, the fund in court—but extends to the whole of the costs of the applicants in the action, down to and including the present date.

The Solicitors Act, 1932, s. 69, provides as follows:

> Any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the solicitor entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit, matter or proceeding, and may make such orders for the taxation of the said costs and for raising money to pay, or for paying, the said costs out of the said property as they think fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a *bona fide* purchaser for value without notice, be void as against the solicitor . . .

Then there is a proviso which is immaterial to the present case. That section differs somewhat in its wording from the Solicitors Act, 1860, s. 28. In particular, instead of the words "in reference to that suit, matter or proceeding" the Solicitors Act, 1860, s. 28, uses the words "of or in reference to such suit, matter or proceeding." Counsel for the applicants contends—and it has not been disputed in argument—that the words used in the two sections have the same effect, so far as the matter before me is concerned. He submits, first of all, that there is jurisdiction under the section to make the order for which he asks. I do not doubt that there is jurisdiction to make the order if the court thinks fit, and to that extent I do not think that the note in THE ANNUAL PRACTICE, 1940, p. 2371, under the heading "Extent of" is quite accurate. That note is as follows:

> This statutory power given to the court in aid of the common law right, see *Re Born* (1) . . . is confined to the costs, charges and expenses incurred in respect of the particular property "recovered or preserved", as to which see (n.) p. 2375: it is not a general charge for all costs . . .

I think that in fact the statutory power extends more widely than is stated there, and indeed the contrary was not contended by counsel for the Inland Revenue Commissioners and by counsel for the respondent to this application. They argued that, although the power extends to the whole costs of the solicitor in relation to the whole of the action, it ought to be limited, and ought to be limited as a matter of principle, to the costs properly incurred in recovering and preserving the property. Counsel for the Inland Revenue Commissioners has referred me to *Greer* v. *Young* (2), and in particular to the observation of Chitty, J., at p. 550:

> A point to which I called counsel's attention was that the order had not been so drawn as to limit, as it ought to have done, the costs of the solicitor to his costs properly incurred in recovering and preserving the property.

Counsel for the Inland Revenue Commissioners also relied on the observations of Sir William Brett, M.R., at p. 552:

> I do not adopt the idea of salvage as an accurate analogy in all respects, but I think the fundamental theory is, that what is recovered by the action of the solicitor is to be treated as if he had earned salvage, and that he is to be paid for his services on the theory that salvage services have been rendered.

Similarly, Bowen, L.J., said, at p. 556:

> It appears clear to me that it [the Solicitors Act, 1860, s. 28] is a salvage section. The solicitor is treated as a salvor who has recovered or preserved something in a time of danger by his work and labour. Into whatever hands it may fall it is charged with the salvage.

These passages seem to me to show quite clearly that the principle upon which the court proceeds is that the solicitor is to be rewarded for his efforts to the extent of receiving the costs, charges and expenses properly incurred in recovering or preserving the property. Counsel for the Inland Revenue Commissioners also referred me to *Emden* v. *Carte* (3), *Turnbull* v. *Richardson* (4) and *Scholey* v. *Peck* (5) as supporting the argument which he put before me. I agree that they do support that argument, and I propose to make an order in accordance with the submission put before me by him.

With regard to *Charlton* v. *Charlton* (6), *Re John Clayton, Ltd.* (7) and *Re Knight, Knight* v. *Gardner* (8) the cases cited by counsel for the applicants, I think that in those cases there were circumstances which justified the court in making an order covering all the costs incurred in the action. I do not propose to examine those cases in detail, but I think that they are clearly distinguishable from the present case. In the present case, the solicitors are acting only for the defendants. They have no doubt earned their reward, so far as this fund in court is concerned, to the extent to which costs have been incurred in recovering and preserving the fund. I see no reason for departing from what I conceive to be the general principle and giving them any wider charge than that.

I may add that the three cases referred to in The Annual Practice, 1940, p. 2371, do not, in my view, establish the broad statement for which they are quoted as authority, and I think that the note in The Annual Practice, 1940, appears to be based upon a passage in the judgment in *Mackenzie* v. *Mackintosh* (9). I do not think that that passage, when read in its context, establishes what is said in the note. For these reasons, I propose to limit the declaration to be made in para. (1) of the summons to the costs, charges and expenses properly incurred in recovering or preserving the fund in court, and I do not propose to give that charge priority over the stop order which has been imposed in favour of the Inland Revenue. I do not express any view on that matter, as it has not been fully argued. It is a purely academic point, as it is quite obvious that the fund in court will be ample to meet the costs in question without trespassing on the Crown's claims.

Solicitors: *Savage Cooper & Wright* (for the applicant); *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners); *Forsyte, Kerman & Phillips* (for the respondent).

[*Reported by* CHARLES NEWTON, ESQ., *Barrister-at-Law.*]

Re GILT EDGE SAFETY GLASS, LTD.

[CHANCERY DIVISION (Crossman, J.), **March 4, 5, 6, 1940.**]

Companies—Directors—Qualification shares—Directors not holding requisite number of shares—Directors continuing to act—Power of court to grant relief—Summary Jurisdiction Act, 1848 (*c.* 43), *s.* 11—*Companies Act,* 1929 (*c.* 23), *ss.* 141 (5), 372 (1), (2).

The petitioners had been directors of the respondent company, and had continued to act as such in spite of the fact that, in consequence of a reduction in the capital of the company, they had ceased to hold the requisite number of qualification shares as provided by the articles of association. Thereupon the respondent company had commenced proceedings against them under the Companies Act, 1929, s. 141 (5), which proceedings were still pending before the appropriate court of summary jurisdiction. The petitioners claimed (i) relief under sect. 372 of the Act from liability in respect of fines or penalties which might have been incurred pursuant to sect. 141 (5), and (ii) relief under sect. 372 of the Act from future liability in respect of acts done while they were not qualified to act as directors:—

HELD: (i) as, on the facts, the petitioners, although disqualified, had acted honestly and reasonably, the court was entitled, having regard to all the circumstances of the case, to exercise its discretion in their favour, and to protect them against future or apprehended claims.

(ii) the discretion of the court did not, however, extend to the pending proceedings, and the proceedings before the court of summary jurisdiction remained unaffected by the exercise of the discretionary power of the court.

[**EDITORIAL NOTE.** Where directors have inadvertently acted without qualification they may be granted relief. Upon application to the Chancery Division, they can be granted relief in respect of prospective proceedings, that is to say, proceedings which have not been commenced at the time when the relief is sought. If the proceedings have been commenced, then relief must be sought in the court in which the proceedings are taken, and that is the only court which can grant relief. This is so even where proceedings are taken in a court of summary jurisdiction.

AS TO RELIEF IN CASE OF NEGLIGENCE ON THE PART OF DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 331, 332, para. 545; and FOR CASES, see DIGEST, Supp., Companies, Nos. 3345a, 3345b.]

Case referred to:

(1) *Re Barry & Staines Linoleum, Ltd.*, [1934] Ch. 227; Digest Supp.; 103 L.J.Ch. 113; 150 L.T. 254.

Petitions by disqualified directors for relief under the Companies Act, 1929, s. 372. The facts are fully set out in the judgment.

Hon. Charles R. R. Romer, K.C., and *Valentine Holmes* for the petitioners.

G. D. Roberts, K.C., and *Maurice Berkeley* for the respondent company.

A. Andrewes Uthwatt for the Board of Trade.

Crossman, J.: These are two petitions which have been heard together, each petition being by a director of Gilt Edge Safety Glass, Ltd., asking for relief under the Companies Act, 1929, s. 372, from liability by reason of certain events which have happened and for which they may be held liable. The actual prayer in the two petitions is in this form:

> 1. That your petitioner [Maurice Gordon Liverman] may be relieved by this honourable court pursuant to the Companies Act, 1929, s. 372, from any liabilities for fines or penalties which he may have incurred under [the Companies Act, 1929, s. 141] or otherwise by reason of his negligence default breach of duty or breach of trust in having acted without being qualified and while disqualified as a director of the company. 2. That your petitioner may also be relieved by this honourable court pursuant to the said section from any liability which he may be under to the company in respect of his negligence default breach of duty or breach of trust in drawing or receiving remuneration or otherwise acting as a director of the company without being qualified and while disqualified to act as such.

This company, Gilt Edge Safety Glass, Ltd., was incorporated in 1929 under another name. In 1931, its capital was increased to something which has now been reduced, and in 1935 it adopted its present name of Gilt Edge Safety Glass, Ltd. At the beginning of 1936, the company known as Lancegaye Safety Glass (1934), Ltd., acquired the whole of the issued share capital of this company—namely, 21,294 ordinary shares of £1 and 17,000 founders' shares of 1*s*. On Feb. 26, 1936, those shares were transferred to Lancegaye Safety Glass (1934), Ltd., which company I propose to call Lancegaye for short. On May 18, 1936, the two petitioners, Maurice Gordon Liverman and Charles Walter Latham, who were directors of Lancegaye, were elected directors of this company, which I will call, in order to avoid confusion, Gilt Edge. They were elected directors of Gilt Edge, and, pursuant to the requirements of the articles of Gilt Edge, 10 ordinary shares of £1 each were transferred to each of them as director's qualification, Lancegaye holding, I think, all the rest of the shares in Gilt Edge. On Feb. 8, 1937, the petitioner Charles Walter Latham was appointed managing director of Gilt Edge at a salary of £500 per annum, he being already entitled under the articles of Gilt Edge to a salary as director, to which Liverman was also entitled. Then on Apr. 12, 1937, an order was made confirming the reduction of the capital of Gilt Edge from £22,850 to £7,381 6*s*. 8*d*., a very drastic reduction. That order was subsequently registered. The result of the registration of that order and the minute was that the petitioners' 10 shares of £1 each became 200 shares of 4*d*. each, and, instead of being of the nominal value of £10, they became of the nominal value of £3 6*s*. 8*d*. The articles of Gilt Edge require as directors' qualification that shares of the nominal value of £10 shall be held by the directors. That being the case, as from the registration of this order in Apr., 1937, the company was left without any director at all, because the petitioners were both in the same position, each holding only 10 £1 shares. Then in June, 1939, a company called Triplex Safety Glass, Ltd., acquired practically all the shares in Lancegaye, Lancegaye then being the holder of all the shares in Gilt Edge. On June 29, 1939, the petitioners purported to resign their directorships. As a matter of fact, they had not any directorships to resign, but as from that date they ceased to act as directors. During the course of their directorships, the first petitioner, Liverman, had received the sum of £116 15*s*. 2*d*. as director's fees, and the other petitioner, Latham, had received the sum of £1,497 13*s*. 2*d*., partly as ordinary fees and partly as salary as managing director. On Oct. 6, 1939, a summons was issued based on information sworn by the secretary of the Lancegaye company, and the information alleged that the petitioners acted as directors on June 29, 1939, after the expiration of two months from the date of their appointment, contrary to the Companies Act, 1929, s. 141 (5). That information came before the magistrate at the Bow Street police court on Oct. 16, 1939, and it was thereupon adjourned *sine die*. On Oct. 18, two days after the adjournment of the summons, a claim was made by Gilt Edge against these two petitioners for repayment by them of the fees received by them as directors from the date when the reduction took effect. On Dec. 13, 1939, the summons at Bow Street police court was restored for Jan. 8, 1940, and on Jan. 4, 1940, the petitioners presented the two petitions praying for that relief which I have already read. On Jan. 8, the summonses at Bow Street were again adjourned.

I now turn to the articles of association of Gilt Edge to see the position. Art. 13 provides as follows:

> The qualification of a director shall be the holding of shares of the company of the aggregate nominal value of at least £10, and it shall be his duty to comply with the provisions of the Companies (Consolidation) Act, 1908, s. 73. A director may act before acquiring his qualification.

The Companies (Consolidation) Act, 1908, s. 73, is the section which is now represented by the Companies Act, 1929, s. 141. Art. 14 provides as follows for disqualification of directors:

> The office of a director shall be vacated . . . (2) If he ceases to be a director by virtue of the Companies (Consolidation) Act, 1908, s. 73.

The position clearly was that, on this reduction taking effect, these two petitioners had vacated their office. They ceased to be directors. Then the Companies Act, 1929, s. 141 (5), provides as follows:

> If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding £5 for every day between the expiration of the said period or shorter time or the day on

> which he ceased to be qualified, as the case may be, and the last day on which it is proved that he acted as a director.

I have been referred to the Summary Jurisdiction Act, 1848, s. 11, which provides that the directors cannot be proceeded against more than 6 months from the time at which the offence occurred, and, therefore, as the last offence occurred on June 29, 1939, no further proceedings under that section can be taken against these two persons. Then I find that sect. 372 of the Act, which is the section under which I am asked by the petitioners to exercise jurisdiction, provides as follows:

> (1) If in any proceeding for negligence, default, breach of duty, or breach of trust against a person to whom this section applies it appears to the court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think fit. (2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the court for relief, and the court on any such application shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

Then sect. 372 (4) provides as follows:

> The persons to whom this section applies are . . . (*a*) directors of a company . . .

Thus the petitioners, who come within that subsection, can be said to be persons to whom the section applies. The decision of Maugham, J., in *Re Barry & Staines Linoleum, Ltd.* (1) I think is clearly an authority for the proposition that sect. 372 (1) of the Act applies to such proceedings as were commenced in Oct., 1939, at Bow Street police court. In that case, the judge came to a conclusion which made him decide that he could give relief from prospective liability for proceedings under that section, which shows, I think, that he took the view that the phrase "in respect of his negligence, default, breach of duty or breach of trust" included a summons at a police court for payment of a fine in respect of an act of negligence as a director. It seems to me that sect. 372 (1) quite clearly makes the court which hears the case the only court which has jurisdiction to give relief in respect of proceedings which have already been commenced. Sect. 372 (2), on the other hand, which was not in the earlier Act, but was added in 1929, was clearly intended to meet the case of proceedings which have not been commenced, but which will be commenced in the future and gives the court jurisdiction to grant relief from prospective liability. If I am right about the effect of subsect. (1), what the petitioners here say in para. 1 of the prayer does not seem to me to apply to the Bow Street proceedings at all. That subsection does not enable me to deal in any way with what the magistrate has done or is doing at Bow Street, and those proceedings are untouched, and will be untouched, by any order which I make here. I do not see how I can ignore the expression "the court hearing the case." The court hearing the case must be the court hearing the particular case in which the proceedings are taken, and it is for the magistrate at Bow Street to deal with the summons which is pending there for fines and penalties alleged to have been incurred by these petitioners in respect of their negligence, default, breach of duty or A breach of trust. It is true that para. 1 of the prayer was not expressly limited to the Bow Street proceedings, but, having regard to sect. 11 of the Act of 1848, I think that those are the only proceedings, and, therefore, I do not think that I can make any order on para. 1 of the prayer.

B Para. 2 of the petition is an entirely different matter. It seems to me that, if the petitioners bring themselves within the subsection, I have power under subsect. (2) to make an order, provided that it does not apply to the Bow Street proceedings. Those proceedings will be expressly excepted from it. The question which I have to decide is C whether I ought to make an order under that subsection relieving them from apprehension of liability. It has been suggested here that the last paragraph of the judgment of MAUGHAM, J., in *Re Barry & Staines Linoleum, Ltd.* (1) shows that I ought not to make any order where the company is unwilling that an order should be made. It seems to me D that what MAUGHAM, J., is referring to in the last paragraph of his judgment is the necessity of his knowing what view the shareholders in the company take before he comes to a decision as to giving relief under subsect. (2). It does not follow, I think, that, because the shareholders oppose the application, therefore he has no jurisdiction. It is only one E of the circumstances which he has to take into account. What I have to consider in this case, having got rid of the first two conditions of the section—that is to say, honesty and reasonableness, for I think that it is substantially admitted by the company that in this case the directors acted honestly and reasonably—is whether or not, having regard to all F the circumstances of the case, including those connected with their appointment, the petitioners ought fairly to be excused for the particular default, negligence, breach of duty or breach of trust. Here it is admitted that the directors in question had no idea that they had ceased to be directors owing to this reduction of capital. The solicitor G who acted in the matter of the reduction has given evidence before me, and it is quite clear that he had not realised it, and I do not think that even an expert lawyer can necessarily be blamed for not having observed that particular result of the reduction. It was a pure accident, I think, that these three men, or the other two, became H disqualified when the reduction took place. They did not consider it, and the question is whether their not having thought about it amounts to such negligence as to make them liable under this section. I think that in a sense it may be that they were negligent, and, without knowing it, they committed a breach of duty in continuing to act as directors when they were no longer qualified. However, this being a purely technical defect, which, if it had been realised, would have been put right at once, because they were merely representatives of Lancegaye, who held the shares, and they could have transferred sufficient of the 4*d.* shares to meet the qualification, and would have done so, I have no doubt, if they had realised the position, having regard to the fact that they did not in fact hold shares of the nominal A value of £10, appears to have made no difference whatever to the company, which suffered no loss from it, and having regard to the circumstances of the case, including those connected with the appointment, I find it difficult to see how I can say that they ought not fairly to be excused from what is a pure technicality. It has been suggested B that they were in some way or other neglecting their duty as directors, and that they got more money than they ought to have got. Those points, which came out in the cross-examination of one of the witnesses, seem to me to be wholly irrelevant here, even if I were to accept them as facts. The fact that the Triplex company may have some grievance C against the directors of Gilt Edge does not seem to me to justify me in refusing to exercise the discretion, which I have under the section, to say that the directors may be fairly excused from what is a purely technical objection to their conduct. The result is that I think that this is a case where I ought to exercise my jurisdiction to protect these D persons from future or apprehended claims, and there seems to be good ground for apprehension, because the company's solicitor says that one may be made.

Order that petitioners be relieved from liability, the order to be drawn in such manner as to leave unaffected the pending proceedings before the E *court of summary jurisdiction. Costs to be paid by petitioners.*

Solicitors: *Linklaters & Paines* (for the petitioners); *Last, Riches & Fitton* (for the respondent company); *Solicitor to the Board of Trade* (for the Board of Trade).

F

[*Reported by* F. Honig, Esq., *Barrister-at-Law.*]

G

NOTE.

R. *v.* CRONIN.

([1940] 1 All E.R. 618.) H

The court ordered the new trial to be held at the next sessions for the Borough of Ipswich and not at Bury St. Edmunds where the first trial took place.

OULU OSAKAYETIO OF OULU, FINLAND *v.* ARNOLD LAVER & CO., LTD., AND OTHERS.

[COURT OF APPEAL (Slesser, Luxmoore and Goddard, L.JJ.), **March 14, 1940.**]

Sale of Goods—C.i.f. contract—Insurance—Increased premium due to war risk—Goods shipped on ship of belligerent state.

Contracts for the purchase of timber to be shipped from Finland to Hull were entered into in Oct., 1938, the shipment to be made in Nov., 1938. The contracts were c.i.f. contracts, and provided, by cl. 6, for insurance of the goods, including the risks covered by Institute war and strike clauses in force at time of attachment of insurance, any increase of premium for covering such risks beyond the rates ruling on Sept. 26, 1935, to be for buyers' account. The rate for covering such war risks was on Sept. 26, 1935, 3*d.* per £100, on Oct. 29, 1938, 2*s.* 6*d.* per £100, and that remained the schedule rate at all material times. From Nov. 2, 1938, when a Spanish Government vessel was sunk by enemy action, the rates on Spanish Government vessels rose rapidly. The cover note for the goods here in question stated that the goods were covered at the schedule rate for sailing on or before Nov. 5, but subject to 48 hours' notice of cancellation unless sailing on or before Nov. 28, 1938. The ship in which the goods were shipped was a Spanish Government vessel, which sailed on Nov. 12, 1938, and on Nov. 7, 1938, the shippers' agents informed the buyers that the rate of insurance had been fixed between the sellers and the insurers at £5 per £100. The buyers contended that the sellers were not entitled to charter a ship belonging to a belligerent notoriously weaker at sea than his enemy, and to insure the goods at a premium to be fixed at the discretion of the underwriters on an unknown date of sailing:—

HELD: the language of cl. 6 required the comparison of a ruling rate with a ruling rate, and, in so far as there was no ruling rate for Spanish ships at the time when the comparison was said to have been made, the contract had no application as regards the part of the clause putting any increase of premium upon the buyers, and the sellers' claim, therefore, failed.

Decision of ATKINSON, J. ([1939] 4 All E.R. 88) *affirmed.*

[**EDITORIAL NOTE.** It is implied in a c.i.f. contract that the shippers shall act reasonably in taking steps which impose a burden on the other contracting party, and that they shall take all reasonable steps to mitigate the expense to which that party may be put. The Court of Appeal have stated their view that it is not necessarily unreasonable to ship goods on a ship belonging to a state actually at war, and based their decision wholly on the construction of the relevant clause.

AS TO INSURANCE UNDER C.I.F. CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 216, 217, para. 288; and FOR CASES, see DIGEST, Vol. 39, pp. 582, 583, Nos. 1844-1853.]

Cases referred to:

(1) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, *5048*; 58 L.J.P. 73; 60 L.T. 654.

(2) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 12 Digest 610, *5042*; 60 L.J.Q.B. 734; 65 L.T. 286.

APPEAL by the claimant from a judgment of ATKINSON, J., dated Oct. 17, 1939, and reported [1939] 4 All E.R. 88. The facts are fully set out in the judgment of SLESSER, L.J.

H. St. John Field, K.C., and *H. G. Robertson* for the appellants.

F. A. Sellers, K.C., and *Robert E. Gething* for the respondents.

Slesser, L.J.: In this case, the arbitrator has held in an arbitration heard before him:

> . . . that the respondents are liable to pay to the claimants the full increase in war risks premium—namely, £4 19*s.* 9*d.* per cent.—and I award and direct that the respondents do each of them pay to the claimants the said increase in war risks on their respective parcels of wood goods.

The obligation to pay this increased premium is said to arise under three c.i.f. contracts with regard to wood goods shipped from the port of Oulu in Finland and to be conveyed to Hull, in which contracts there is a special provision in cl. 6 with regard to the payment of the insurance. The language of cl. 6 is as follows:

> Before or as soon as tonnage is secured the marine insurance of cargo at f.o.b. invoice value plus 10 per cent. and of freight advance to be covered by sellers with a first-class company or underwriters as per Lloyd's form of policy, together with federation clauses printed in margin, losses payable in London and including the risks covered by the Institute war and strike clauses in force at the time of attachment of the insurance.

Then follow these words, which are the material words, on which the claimants must rely in this case:

> Any increase in premium payable for covering the whole of such war risks and such strike risks in respect of the country of destination in excess of the rates ruling at Sept. 26, 1935, to be for buyers' account.

Then follow these words:

> Sellers' obligation under this contract to insure against war and/or strike risks is subject to the proviso that such insurance can be covered. Should it not be possible to cover such insurance, or should insurance be cancelled by underwriters, sellers shall give prompt telegraphic advice to buyers who shall thereupon have the option of cancelling the contract.

By agreement, a statement of facts was placed before the arbitrator, and in cl. 8 of the agreed statement of facts it is stated as follows:

> The war risk rate on cargo from Baltic ports to the United Kingdom ruling on Sept. 26, 1935, was 3*d.* per cent.

The facts of the case are these. Three contracts dated Oct. 6, 7 and 8, 1938, having been duly entered into, on Oct. 18, 1938, the agents of the shippers chartered a Spanish steamer known as the El Neptuno to convey these goods, and on Oct. 26 copies of the charterparty were sent by the shippers' agents to each of the three buyers. Clause 6 provided as follows:

> Before or as soon as tonnage is secured the marine insurance of cargo at f.o.b. invoice value plus 10 per cent. and of freight advance to be covered by sellers with a first-class company. . . .

Under that obligation, on Oct. 29 the shippers through their agents entered into an agreement for insurance to cover the war risk on the goods with Lloyd's underwriters at the premium of 3*s.* 6*d.* per cent. The cover note was said to be in the customary manner, and was in these words:

> Wood goods in and over including freight advance, if any, per "El Neptuno" to Hull including war etc, risks at 3*s.* 6*d.* per £100 sailing on or before Nov. 5, 1938, held covered thereafter at schedule rate on date of sailing but subject to 48 hours' notice of cancelment unless sailing on or before Nov. 28, 1938.

On Oct. 6, 1937, it appears from cl. 9 of the agreed statement of facts that Spanish and Greek steamers had been excluded from the agreed minimum rates for war risks fixed by the rates committee appointed by Lloyd's underwriters, and the rates were left to the underwriters' discretion. The fact is, as appears in cl. 10, that, whereas the war risk A normally was 2*s.* 6*d.*, at that time, in the case of Spanish ships, and apparently Greek ships, under the discretion the sum of 3*s.* 6*d.* per cent. was fixed. Thus, by covering a Spanish ship rather than a ship not excluded from the prevailing rate for war risk, the cover was increased by 1*s.* per cent. After that, events happened which made the disparity B still more marked. On Nov. 2, 1938, another ship, the Cantabria, which was also owned by the Spanish Republican Government, was attacked by a Spanish Insurgent auxiliary cruiser in the North Sea and sunk by gunfire 6 miles off Cromer, and again, as a result of that, the war risk on Spanish government vessels rose substantially. There is no suggestion C in the admitted facts that the earlier disparity, by which the rate was increased through Spanish and Greek ships being excluded from the prevailing rate, was due to the Spanish war. On Saturday, Nov. 5, 1938, the El Neptuno not yet having sailed, the schedule rate referred to in the cover note became applicable. That note being, of course, for only a D very short duration, there was communication with the insurance brokers, who feared that the rate was likely to be increased considerably by the date of sailing. They fixed the premium at £5 per cent., and the vessel sailed on Nov. 12, 1938. Between Nov. 5, and Nov. 12, it is interesting to note that the rate for Spanish ships in the North Sea had risen to E £10 10*s.* per cent. It is in respect of that sum of £4 19*s.* 9*d.* per cent.—that is, deducting from the £5 the 3*d.* which had been the war risk on cargo from Baltic ports on Sept. 26, 1935—that the claim is made.

In my view, the whole question has to be determined on a proper interpretation of this contract, and more particularly of cl. 6. I find F in cl. 6 some indication of the intention of the parties as expressed in the written document itself. The sellers' unusual right to put these expenses of premiums on to buyers' account is stated in language which must be carefully considered:

> Any increase in premium payable for covering the whole of such war risks and G such strike risks in respect of the country of destination in excess of the rates ruling at Sept. 26, 1935, to be for buyers' account.

If the case cannot be brought within those words, either expressly or by reasonable implication, that they do not sufficiently express the intention of the parties, and that the proper view is that further implications must H have been intended by the parties to give commercial efficacy to the document, then the claim must fail. In my view, this clause contemplates a comparison between like and like. It is dealing with a comparison of the rates ruling at Sept. 26, 1935, and the rates ruling at the time contemplated in the contract, but in both cases what have to be considered are the ruling rates or, as ATKINSON, J., puts them, the schedule rates—

that is, the normal market rates recognised as applicable to ships of this class and flag. There is no doubt that the ordinary ruling rate at the time here to be considered in 1938 would be, as it was admittedly before Oct. 6, 1937, for war risks on cargoes from Baltic ports, and would not include any particular kind of steamers which for one reason or another had been removed from the ruling rate. Such steamers were, after Oct. 6, A
1937, Spanish and Greek steamers. In other words, after Oct. 6, 1937, there was no rate ruling which could have applied to a Spanish or a Greek steamer, and, in my view, quite apart from any question of belligerency, the 3*s.* 6*d.* on the cover note is not comparable to the 3*d.* which was the war risk rate ruling on Sept. 26, 1935, in order to discover what, if any B
was the excess, because the one is in a different category from the other. The one is the case of the prevailing ruling rate and the other is the case of an exceptional rate, fixed by discretion, and not by rule or schedule or general category.

Therefore, in my view, the right way of looking at this matter is that C
it was never intended by the parties in this agreement in writing, following from the words actually used, that any such rate as 3*s.* 6*d.* should be comparable to 3*d.* The prevailing rate at the time when the comparison had to be made was 2*s.* 6*d.*, and not 3*s.* 6*d.* The fact that later on, by reason of the sinking of the Cantabria, the discrepancy became even more D
marked does not, in my view, affect the principle here to be considered. As I have said, in this particular case it did happen that the actual agreement made was £5 per cent., but, in my view, equally if it had remained at 3*s.* 6*d.*, the excess could not have been ascertained by reference to the rate ruling on Sept. 26, 1935. That view, which I say E
I derive from the actual language of cl. 6, seems to me consistent with good sense. I cannot think that it was the intention of the parties that the buyer should be entirely in jeopardy, that the seller might choose any ship of any quality, flag or condition that he liked, and then that he should be able to say, "It is possible to cover the insurance," in which F
case there would be no obligation on the seller to give prompt telegraphic advice to the buyer, who would then have the option of cancelling the contract. In such a case, it would be possible to cover the insurance, possibly at some exorbitant or extravagant rate. That being possible, the buyer would not have the option of cancelling the contract under the G
last limb of cl. 6, and all the unnecessary and swollen excess would be for the buyers' account. As I say, I think that that is a very improbable bargain between the parties, and one which I should be very reluctant to accept.

In my view, for the reasons I have stated, it is not necessary here to H
invoke the principle of *The Moorcock* (1) or of *Hamlyn & Co.* v. *Wood & Co.* (2), or to import into the contract what is not there. I think that the actual language of the contract requires the comparison of a ruling rate with a ruling rate, and, in so far as there was no ruling rate for Spanish ships at the time when the comparison was said to have been

made, I think that the contract has no application as regards this part of the clause, and, therefore, the claim must fail.

I would add—since I think that the judge is perhaps mistaken in one way in which he looks at this case—that the question of the reasonableness or propriety of chartering a Spanish ship has nothing to do with the case. It may well be that under this contract as a whole the sellers were fully entitled to charter either a belligerent ship or a non-belligerent ship. The question I have to consider is whether or not, having done so, they have established a right to hold the buyers to account for the difference between the rate which they paid for insurance on chartering such a ship and the rate prevailing at Sept. 26, 1935. For the reasons I have stated, I think that they had no such right, and that the judge was right on the case stated in holding that the arbitrator was wrong in the view to which he came.

LUXMOORE, L.J.: I agree that this appeal must fail. The question to be determined is whether the sellers can recover from the buyers the difference between the sum actually paid by the sellers for insurance in respect of war risk for goods carried on a Spanish ship chartered by them and the general market rate which was ruling on Sept. 26, 1935. The sum actually paid by the sellers was calculated at the rate of £5 per cent. on the value of the cargo. The agreed facts show that the general market rate on Sept. 26, 1935, in respect of war risk on cargoes from Baltic ports to the United Kingdom was 3*d.* per £100, and that on Oct. 6, 1937, the ships of two nationalities—namely, Spanish and Greek—were excluded from the general rates ruling on Sept. 26, 1935. The sellers elected to charter a Spanish ship, and I do not think that there is any reason to suggest that they had no right to charter such a ship. At the date of the insurance, there was no general market rate applying to Spanish ships, and the answer to the question which really has to be determined depends entirely, I think, on the construction to be placed on the contract between the parties.

The principal part of the contract which has to be considered is cl. 6 of the special conditions which are included in the contract. The clause provides that the sellers shall insure against war risks the goods which are the subject of the contract, and, although it is a c.i.f. contract, it contains the unusual provision that, in respect of part of the insurance, the buyers shall be responsible. The material part of the clause, I think, is as follows:

> Any increase in premium payable for covering the whole of such war risks and such strike risks in respect of the country of destination in excess of the rates ruling at Sept. 26, 1935, to be for buyers' account.

Does that mean any increase in premium which the sellers may choose to pay, no matter whether it is in excess or otherwise of the general market rate, or is it intending to compare like with like? At the date of the insurance, there was a general market rate of 2*s.* 6*d.* per cent. of the value for war risk insurance from Baltic ports in respect of all ships except Greek and Spanish ships. It seems to me that, when one considers this clause and sees that what has to be paid is an increase in premium over something which was existing on Sept. 26, 1935, and when one appreciates that the rate which was then existing was the general market rate, one must also, when considering the increase to be placed on the buyers, look to see what was the general market rate applicable at the date in question, and that was 2*s*. 6*d*. If the contract is read in that light, I do not think that there can be any doubt but that the only liability which is placed on the buyers in respect of the war risk insurance is the difference between the general market rate of 2*s*. 6*d*. and the market rate of 3*d*. existing on Sept. 26, 1935. I agree that, for the reasons which have already been stated by Slesser, L.J., this appeal must fail.

Goddard, L.J.: I will only add a few words, because, although I agree with the decision of the judge, I am differing from an arbitrator of great experience in this class of case, and also I do not agree with all the reasons or doubts expressed by the judge below. I do not agree, for instance, that there was either any breach of contract or anything unreasonable in the sellers' chartering a Spanish ship. It was open to them to charter any ship they liked. What has to be considered is whether or not they, the sellers under a c.i.f. contract, are entitled to put part of the insurance moneys which they had ordinarily to pay upon the buyers, and that depends entirely upon the construction of a few words in cl. 6 of the contract. I prefer to base my judgment simply on the ground that I think the words " Any increase in premium " must mean " Any increase in the ruling or market rate of premium for war risks "—that is to say, for war risks in general. I find support for that, not only in the words themselves—that is to say, the words of the clause which refer to the excess of the rates ruling on Sept. 26, 1935, and the necessity of comparing like with like, as Slesser, L.J., puts it—but also in the fact that it seems to me that the only reasonable construction to put upon these words is that they are not apt to cover the case of a special rate of premium, quoted by reason of something peculiar to the particular ship selected by the sellers, or the particular class of ships to which that ship may happen to belong. The ruling rate of premium in this case—the market rate of premium—was 2*s*. 6*d*. A particular rate was quoted, but there was no ruling rate for this particular ship, because of the class to which she happened to belong, and I do not think that that is covered by the words of this clause, which I think refer to the market rate only.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Slaughter & May* (for the appellants); *Pritchard, Sons, Partington & Holland*, agents for *Andrew M. Jackson & Co.*, Hull (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

R. v. SURGENOR.

[Court of Criminal Appeal (Charles, Humphreys and Wrottesley, JJ.), **February 19, 1940.]**

A *Criminal Law—Evidence—Unsworn evidence of child—Judge's duty before permitting unsworn evidence to be given—Children and Young Persons Act*, 1933 (*c.* 12), *s.* 38 (1).

The appellant was convicted of housebreaking. Part of the evidence against him was that certain foreign coins were found in his possession, and a bag of foreign coins had been stolen from the café which he was alleged to have burgled. To strengthen this evidence the prosecution called a girl of 9 years of age. The recorder was told that the justices B in the court below would not allow the girl to be sworn, so, instead of satisfying himself as to whether she was in a position to be sworn as is required by the Children and Young Persons Act, 1933, s. 38 (1), he allowed her evidence to be given without having her sworn. She said that she had seen the appellant put foreign coins in the gas meter, and that she had recognised them when the gas man took them out several days C later. The girl was an intelligent child who ought to have been sworn:—

Held: it is the duty of the presiding judge to satisfy himself as to whether or not a child of tender years is in a position to be sworn. Nevertheless, although there had been an irregularity, there had been no such miscarriage of justice as would invalidate the conviction.

D **[EDITORIAL NOTE.** Before the evidence of a child of tender years can be admitted, the presiding judge must satisfy himself that the child is of sufficient intelligence and understands the duty of speaking the truth, and this is so even where the evidence has been admitted in previous proceedings in the same matter.

As to Evidence of Children, see HALSBURY, Hailsham Edn., Vol. 9, pp. 221, 222, para. 308; and for Cases, see DIGEST, Vol. 14, pp. 453-456, E Nos. 4806-4826.]

Case referred to:

(1) *R.* v. *Southern* (1929), 142 L.T. 383; Digest Supp.; 22 Cr. App. Rep. 6.

Appeal by leave from a conviction at the Tenterden Sessions of housebreaking. The facts are fully set out in the judgment of the court F delivered by Humphreys, J.

Dorothy Dix for the appellant.

John Thompson (for *E. N. Landale*, on war service) for the Crown.

Humphreys, J. [delivering the judgment of the court]: In this case, G William John Surgenor was convicted at the Tenterden Sessions of housebreaking, and he was sentenced to 15 months' imprisonment. He applied to this court for leave to appeal against that conviction, but he took no point such as that which has been mentioned here, and such points as he did make in his notice of appeal this court did not think H were of any importance. It was stated by the court itself, however, that there had been an irregularity in the course of the trial, and the court granted leave to appeal so that it might consider whether that irregularity invalidated the conviction.

The charge related to breaking out of a certain café after having stolen a large quantity of property, and the appellant's answer was that he

was not the man. The café was broken into during the night of Nov. 13 by somebody who had climbed on to the roof, reached through an open window to open the main window, and fallen off the roof into the yard below. In that yard there were found spots of blood. There were taken from the café some cigarettes, a substantial quantity of other articles, cash, a bag containing copper coins, and a handbag belonging A
to one of the assistants. Some of that property was found in a cloth on a flat roof just below the café. The next morning, the appellant was seen and spoken to, and it was found that he was suffering from a cut chin, a grazed eye, and a damaged wrist. He told his landlady that he had fallen off a wall. On that morning he produced a 10*s.* note—he B
had hitherto been unable to pay the modest sum of 7*s.* per week for his accommodation, and was 3 days in arrear with his rent—which he gave to his landlady, telling her that she need not produce the change. The next piece of evidence which connected the appellant with the crime was this. When the police came next morning, they found in the toe of one C
of the appellant's shoes a lady's handkerchief. That handkerchief was identified as belonging to one of the girl assistants, who identified it by the one fact that it smelt strongly of Atkinson's Jasmine scent, a bottle of which had been given to her by one of her admirers. Thus, this man had been found in possession of something which had been in the café D
the night before. His answer was that he had had the handkerchief for some time, having bought it with some old rags a fortnight before, and that that was how it came to be in his possession. Then some foreign coins were found in the appellant's possession. A bag of foreign coins had been stolen from the café, and in a drawer in the appellant's room E
were found some halfpennies and a five-centime piece, while in another place was found a South African penny. He denied that he had had any foreign coins at all.

In addition to those matters, when he was asked to account for his injuries, he told the police inconsistent stories, which the jury might F
have thought were untrue. He told his landlady that he had fallen off a wall, and he told the police that he had been in different public-houses and had got his injuries by falling over three or four times. A doctor expressed the view that the appellant's injuries were not caused in that way, but were caused by falling off a high wall on to the ground. That G
being the evidence against this man, a little girl was called, as the prosecution thought it right to strengthen the evidence as to the appellant's possession of foreign coins. The little girl said that she had noticed that the appellant was in possession of foreign coins because she had seen him put in the gas meter a coin which was not an English coin, H
and, when the gas man came three or four days later, he found a foreign coin in the meter. She recognised it and gave it to her mother, and the coin was eventually produced. The girl was cross-examined and her evidence tested, and counsel for the appellant admitted that it was right, and apologised for having to put the questions in cross-examination.

Counsel for the appellant admitted that the girl was intelligent for a girl of 9 years old. When the girl went into the witness-box, the recorder was informed that the justices in the court below would not allow this girl to be sworn, as she could not be expected to know the meaning of the oath, and, instead of making an investigation, the recorder said, A "Very well," and allowed the evidence to be called without the child being sworn. That is contrary to the Children and Young Persons Act, 1933, s. 38 (1), which provides as follows:

> Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand B the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. . . . Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

C That section quite clearly states—and this court has on more than one occasion intimated—that it is the duty of the presiding judge to satisfy himself whether or not a child of tender age is in a position to be sworn. In this case, there was no such proceeding, and the recorder seems to have elected to abide by the justices' view. That was wrong, and this D court has said that it is wrong, and must not occur again. Those who preside over criminal trials ought to remember that it is the duty of the presiding judge to make an investigation for himself. Nevertheless, there was no harm done in the irregularity which occurred in the present case. From her evidence, and from a passage in the summing up of the E recorder, the girl appears to be a very intelligent child, who might and ought to have been sworn. The jury presumably accepted her evidence unsworn, and it is extremely unlikely that they would not have accepted it if she had been sworn. The child was not giving evidence of importance, which needed corroboration. It was merely a make-weight to prove F what the police and the mother had proved—namely, that the appellant had had a foreign coin in his possession and had put it in the gas meter, and that the mother was able to say that it had come out of the gas meter because the gas man had given it to the child. In this case, it cannot be said that there was any injustice done here. There has been an G irregularity which may be said to be of the kind referred to in anticipation in *R.* v. *Southern* (1), where the judgment of the court, of which two of the judges were two of those hearing this appeal, states as follows:

> It is too much to say . . . that it is a rule of law that if, in a case where unsworn evidence has been adduced, the judge does not call the jury's attention to the H provisions of the statute, that necessarily invalidates the conviction. . . .

This court agrees with, and follows, that statement of the law. There may be cases in which the court might quash convictions in those circumstances, but this case is not one of them. The court is satisfied that there was no miscarriage of justice in this case. There has been nothing more than an irregularity, and the appeal is dismissed. However, since leave to appeal was granted, the time during which the appellant has been treated in custody as an appellant will count towards his sentence.

Appeal dismissed.

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellant); *Eric W. G. Weale,* County Prosecuting Solicitor, Sessions House, Maidstone (for the Crown). A

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re FISCHER. B

[Probate, Divorce and Admiralty Division (Hodson, J.), **March 11, 1940.**]

Executors and Administrators—Grant of administration—Discretionary grant—Enemy national dying in England—Persons entitled enemies resident in enemy country—Supreme Court of Judicature (Consolidation) Act 1925 (*c.* 49), *s.* 162—*Administration of Justice Act,* 1928 (*c.* 26), *s.* 9. C

A German national with property in England died there intestate, leaving a widow and three daughters living in Germany and another daughter and a son resident in England. Application was made to the Board of Trade, who stated that there was no objection to the estate being administered in the usual way, provided that a return was made to the Custodian of Enemy Property of any part of the estate demised to, or held for the benefit of, the members of the deceased's family resident in enemy territory, and provided that no part of the estate or the proceeds thereof was transmitted to such members of his family without the necessary government authority. Application was made to the court for a grant of letters of administration to the estate:— D E

Held: letters of administration should be granted under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, s. 9, subject to an undertaking to comply with the conditions of the Board of Trade.

[**EDITORIAL NOTE.** This decision merely shows the practice on a grant of administration to the estate of an enemy alien, more particularly where some of the parties entitled on distribution are resident in enemy country. F

As to Discretionary Grants, see HALSBURY, Hailsham Edn., Vol. 14, pp. 246-248, paras. 424-430; and for Cases, see DIGEST, Vol. 23, p. 166, Nos. 1803-1818.]

Motion for a grant of administration under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, s. 9, in respect of the estate of Hans Heinrich Wilhelm Fischer, deceased. The deceased, who was a German national, died intestate at Nottingham on Feb. 3, 1940, leaving a widow, 4 daughters, and a son, being persons entitled to share in his estate, two of the daughters being minors. The estate was of the value of about £6,000 or £7,000, comprising, *inter alia,* a leasehold house at Nottingham. A life interest and minority interests arose on intestacy. The applicant was the son of the deceased, who was resident in England. Prior to the outbreak of the present war, the deceased had applied to the Home Office for a certificate of naturalisation as a British subject, but, owing G H to the outbreak of war, that application could not be proceeded with. Shortly after the death of the deceased, the family's adviser communicated with the secretary of the Board of Trade for instructions as to how the deceased's estate should be dealt with, and received the reply that, if the deceased at the date of his death was resident in this country, there was no objection to his estate being administered in the usual way, provided that a return was made to the Custodian of Enemy Property of any part of the estate demised to, or held for the benefit of, the members of his family resident in enemy territory, and that no part of his estate or the proceeds thereof was transmitted to such members of his family without the necessary government authority. The court was moved for a grant of administration of the estate to the applicant and to Essex Loftus Digby, solicitor, without citing the widow to accept or refuse a grant of administration.

A. Richard Ellis for the applicant.

HODSON, J.: There will be an order as prayed on the applicant's undertaking to comply with the directions contained in the communication from the Board of Trade.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Wells & Hind*, Nottingham (for the applicant).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

NOTE.—The following practice note was issued by the Senior Registrar of the Principal Probate Registry with regard to estates of deceased persons coming within the provisions of the Trading with the Enemy Act, 1939.

CONSENT BY CUSTODIAN OF ENEMY PROPERTY TO GRANTS OF REPRESENTATION.

The consent in writing of the Custodian of Enemy Property, whose office is situate at that of the Public Trustee, Kingsway, London, W.C.2, must be obtained and produced before a grant of representation can issue (i) in respect of the estate of a deceased person of whatever nationality who was resident in enemy territory, such territory being defined by the Trading with the Enemy Act, 1939, s. 15 (1) (*b*), (ii) in respect of the estate of a deceased German national, who was resident in neutral territory, (iii) to a German national residing in neutral territory in respect of the estate of any deceased.

Such consent is necessary whether the deceased died before or after the outbreak of war.

No grant of representation can issue to any person resident in enemy territory as defined by the aforesaid Act or to his attorney.

Any case in which there is doubt should be referred to the Custodian of Enemy Property for his decision as to the necessity for his consent.

MILLS *v.* MILLS.

[Court of Appeal (Sir Wilfrid Greene, M.R., and Goddard, L.J.), **March 19, 1940.]**

Divorce—Maintenance—Order discharged by consent—Consent order barring liberty to reopen matter without leave of court—Whether matter can be reopened—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 190 (1), (2)—*Administration of Justice (Miscellaneous Provisions) Act,* 1938 (*c.* 63), *s.* 14.

A wife, having obtained a decree *nisi* in 1932, presented a petition for maintenance, and a consent order that the husband should pay her £5 per week was made in Dec., 1932. The husband's payments fell into arrears, and the wife took out a judgment summons. The parties then came to terms, and the wife agreed to accept £1,250 in satisfaction of all past and future claims. In Oct., 1933, a consent order was made that the husband pay the sum of £1,250, that the existing consent order for maintenance be discharged, and that the maintenance petition be dismissed. It was a term of the order that this matter should not be reopened without leave of the court. On Jan. 31, 1940, the husband's financial position having meanwhile improved, the wife took out a summons asking for leave to apply for maintenance.

Held: (i) the original petition for maintenance having been discharged, the court had no jurisdiction to reopen the matter.

(ii) the court had no jurisdiction to include in the order a direction for the payment to the wife of a lump sum. In its proper form, the order would have recited such payment and then, by consent, have discharged the existing order.

[**EDITORIAL NOTE.** The jurisdiction of the court to order maintenance is one which must be exercised within a reasonable time of the making of the decree. The exact time-limit has never been stated, and it was not necessary here to deal with that point, as it was obvious that a reasonable time had elapsed. If the court wholly discharges an order for maintenance, then any later application for maintenance must be a new proceeding, and liable to be defeated by reason of its being out of time. The whole question in the present case is whether, by adding to a consent order wholly discharging a previous order for maintenance a liberty to reopen the matter with the leave of the court, a right is given to the wife to make a further application. This is held not to be so, since, the previous order having been wholly discharged, a new application must, in practically every case, be defeated by the application of the time-limit referred to above.

As to Order Securing Maintenance, see HALSBURY, Hailsham Edn., Vol. 10, pp. 789, 790, para. 1251; and for Cases, see DIGEST, Vol. 27, pp. 511-513, Nos. 5499-5513.]

Cases referred to:

(1) *Scott* v. *Scott*, [1921] P. 107; 42 Digest 958, *319*; 90 L.J.P. 171; 124 L.T. 619.

(2) *Hyman* v. *Hyman*, [1929] A.C. 601; Digest Supp.; 98 L.J.P. 81; 141 L.T. 329.

(3) *Stephen* v. *Stephen*, [1931] P. 197; Digest Supp.; 100 L.J.P. 86; 145 L.T. 541.

(4) *Olding* v. *Olding* (1930), 99 L.J.P. 128; Digest Supp.; 143 L.T. 310.

(5) *Jenkins* v. *Jenkins* (1930), 99 L.J.P. 63; Digest Supp.; 142 L.T. 656.

(6) *Robertson* v. *Robertson & Favagrossa* (1883), 8 P.D. 94; 42 Digest 958, *318*; 48 L.T. 590.

(7) *Shearn* v. *Shearn*, [1931] P. 1; Digest Supp.; 100 L.J.P. 41; 143 L.T. 772.

(8) *Maidlow* v. *Maidlow*, [1914] P. 245; 27 Digest 505, *5408*; 84 L.J.P. 20; 112 L.T. 804.

(9) *Lambert* v. *Lambert*, [1936] 3 All E.R. 20; Digest Supp.

APPEAL by the husband from an order of BUCKNILL, J., dated Feb. 19, 1940. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

Rt. Hon. Sir William Jowitt, K.C., *H. W. Barnard, K.C.*, and *P. R. Hollins* (for *S. E. Karminski*, on war service) for the appellant.

A. Melford Stevenson **for the respondent.**

Jowitt, K.C.: When one makes an order, there are two alternative steps which may be taken. One is under the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1). Under that subsection, the order has to be made "on" a decree. The other step is under the provisions of sect. 190 (2), as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14. When the order is made under the first step, it is final; but, if it is made under the second step, the court has power to vary it. The word "on" in sect. 190 (1) means at the time, or within a reasonable time thereafter. The consent order made in Oct., 1933, contains the words: "This matter not to be reopened without leave of the court." That, however, cannot confer upon the court a jurisdiction which it does not in fact possess. The only jurisdiction possessed by the court is given by the provisions of sect. 190 (1). That jurisdiction is to be exercised on any decree of divorce. There is no jurisdiction under which the court may now make an order allowing the wife to apply for maintenance. No power is given to vary an order which has been made under sect. 190 (1). In the present case, the court is ordering the parties to do something which it has no power to order at all. When the matter came before the judge, he should have said that he had no jurisdiction to deal with it. [Counsel referred to *Jenkins* v. *Jenkins* (5), *Olding* v. *Olding* (4), *Robertson* v. *Robertson & Favagrossa* (6), *Scott* v. *Scott* (1), *Shearn* v. *Shearn* (7), *Stephen* v. *Stephen* (3), *Maidlow* v. *Maidlow* (8) and *Lambert* v. *Lambert* (9).]

Stevenson: There was power to vary the order made in Dec., 1932, by reason of the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2). That order was discharged in Oct., 1933, but there was in the later order the qualification: "This matter not to be reopened without leave of the court." Those words must have been added for some purpose. They have a very important and definite purpose, which is clearly expressed by LORD ATKIN in *Hyman* v. *Hyman* (2). Effect must be given to every part of the order of 1933. The true view of the order of 1933 is that the court has suspended the operation of the order of Dec., 1932. The word "suspend" is used in the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14. The wife cannot deprive herself of her rights. On the true construction of the order of 1933, the earlier order was not discharged. It was merely suspended. The court has not the power to discharge an order. The parties, by consent, cannot confer upon the court power to destroy something which is indestructible.

Sir Wilfrid Greene, M.R.: This appeal raises a question of importance, but one which to my mind is not really open to doubt. A
The facts of the case are shortly these. On May 13, 1932, the wife obtained a decree *nisi* for dissolution of her marriage. That decree was made absolute on Nov. 21, 1932. On Dec. 6, 1932, the wife presented a petition for maintenance. Upon that petition, an order was made on Dec. 29, 1932, which was a consent order directing the husband B
to pay to the wife:

> . . . during their joint lives and until further order maintenance at the rate of £5 a week free of tax. . . .

The order went on to add the words "without prejudice to any future C
order," an addition the necessity for which I am quite unable to appreciate. The insertion of unnecessary words like these in an order is liable to cause doubt and confusion, and it is a practice which should be avoided in future.

In the summer of 1933, the husband's payments fell into arrear, and D
a judgment summons was taken out for £90 arrears. Before that summons was heard, negotiations took place, with the assistance of the solicitors for the parties, as a result of which the wife agreed to accept a lump sum of £1,250 in satisfaction of all past and future claims for maintenance. That bargain having been agreed, a summons was taken out by the wife on Oct. 5, 1933, asking that cause be shown why an order E
should not be made in the form of the order which was eventually made, subject to one qualification which has given rise to the present controversy. I need not read the terms of the summons. The order made upon it by Bateson, J., on Oct. 9, 1933, was in these terms:

F
> Upon hearing counsel for both parties and by consent I do order that the respondent do pay to the petitioner the sum of £1,250 in satisfaction of all sums now or at any time hereafter payable to the petitioner in respect of maintenance, that the existing consent order for maintenance be discharged, that the maintenance petition be dismissed, that the pending judgment summons against the respondent for arrears of maintenance be dismissed, and that the respondent do pay the petitioner's costs of this application and of the said judgment summons as taxed or agreed. G

Down to that point, the order embodied the arrangement made between the parties. Then, however, the following words were added:

> This matter not to be re-opened without leave of the court.

The actual order being a consent order, I think that this part of it must H
be taken to be inserted in the order by the consent of the parties. It is upon the precise meaning and effect of that sentence that the present dispute really turns.

Subsequent to the making of that order, it is said—and, I think, not disputed—that the husband's financial position improved. There is no necessity to go into the reasons for that, but that was the ground upon which the wife based the application which is now before us on the husband's appeal.

On Jan. 31, 1940, the wife took out a summons calling upon the husband to show cause why she should not have liberty to apply for maintenance in accordance with the provision contained in the order dated Oct. 9, 1933. That summons came before BUCKNILL, J., who on Feb. 19, 1940, made an order that:

> . . . the petitioner be at liberty to file forthwith a notice of application for an order for maintenance.

Then he gave leave to appeal. That appeal is accordingly now before us, and it is said that, in the circumstances, the judge had no jurisdiction to make that order. It is not suggested that, if he had jurisdiction, we should be justified in interfering with what, upon that footing, would have been an exercise of discretion. The only matter with which we have to deal is the single matter of the jurisdiction of the court.

The first point to bear in mind is the language of the relevant statutes which confer jurisdiction upon the Divorce Court in respect of maintenance. Those provisions may be found in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14.

Under sect. 190 of the Act of 1925, for the present purpose there are two forms of order which the court is empowered to make. One is an order securing to the wife a gross or annual sum of money. That is under sect. 190 (1). The other is an order under sect. 190 (2) for the payment " during the joint lives of the husband and wife " of monthly or weekly sums. An order under that subsection may be made either in addition to, or instead of, an order under sect. 190 (1).

Under the Act of 1925, there was power in the court, in case of an increase in the means of the husband, to vary any order made under sect. 190 (2) for the payment of a periodical sum. That particular proviso has now gone, by reason of sect. 14 of the amending Act of 1938, under which an order made under sect. 190 (2) of the Act of 1925 can be discharged or varied or suspended. The power of the court with regard to those matters is now wider than it was before, but that circumstance does not affect what we are now called upon to consider.

At the outset, one matter must be remembered with regard to the jurisdiction of the court under the provisions of sect. 190, to which I have referred. That jurisdiction can only be exercised on any decree for divorce or nullity of marriage. Accordingly, if an application is made by a wife of which it can fairly be said that an order made upon it would not be made " on " such a decree, the court has no power to accede to the application. The precise time-limit within which the application may be made cannot be laid down. It would be unfortunate to attempt to lay it down, and I certainly would not propose to do so. However, that a time-limit must exist, and one which, within certain

limits, may be varied, has been decided in *Scott* v. *Scott* (1). That is a decision of this court establishing the proposition that the words " on a decree " indicate that the time for the application must be a reasonable one in relation to the date of the decree. If the present application had been a new application made in 1940 in reference to a decree of divorce which was made absolute in November, 1932, it could not, in A
my opinion, be suggested for one moment that the court would have had jurisdiction to deal with the application. In my opinion, an order made on an application launched so many years afterwards would not have been an order made on a decree for divorce. The present application can succeed only if it can be treated as in some way referable to B
the previous proceedings.

Bearing that in mind, it is necessary now to look at the order of Oct. 9, 1933, in order to see on its true construction what it means. Apart from the contested words at the end, it seems to me that the construction of this order is clear beyond any possibility of doubt. The C
order directs the payment of a lump sum :

> . . . in satisfaction of all sums now or at any time hereafter payable to the petitioner in respect of maintenance. . . .

It discharges the existing consent order for maintenance, under which the sum of £5 per week was paid, which was dated Dec. 29, 1932. It D
also dismisses the maintenance petition. Taking that language at its face value (as it is perfectly clear language), the result down to that point is that the existing order for maintenance has gone, and that the petition upon which it was made, and upon which any future application for its variation would have hung, has also gone. The order on the face E
of it also purports to direct payment of a lump sum. That payment is something which the court had no jurisdiction in itself to order, because the jurisdiction of the court, so far as relevant, is confined to securing, under sect. 190 (1), a gross or annual sum, or under sect. 190 (2), ordering the payment of a periodical sum to the wife. It is settled that the court F
has not power to order payment to the wife out-and-out of a lump sum, but it has also been held that the court has jurisdiction by consent to make an order of that character. The order, therefore, on the face of it, is an order by consent directing the husband to do something which the court, apart from consent, could never order him to do, and by consent G
it is discharging the original order, and dismissing the petition upon which it was made. I should have thought that the true construction of an order in those terms could not be subject to controversy, but the main argument put forward on behalf of the wife is to this effect. It is said that, when the order is read as a whole, including the words "This H
matter not to be reopened without leave of the court," its true meaning is not that the order of Dec., 1932, was discharged, but is that its operation was merely suspended, with the consequence that the wife at any future time could call upon the court to exercise its jurisdiction (which on that hypothesis the court would have retained) of varying the order

for payment of a periodic sum, if circumstances justified such variation. That argument is one which I find myself quite unable to accept. It seems to me that such a construction, if any respect is to be paid to language, is treating this order as doing the exact opposite to what it purports to do—namely, keeping alive and in force an order which in terms it has discharged. Whatever these words may mean, or may purport to mean, they cannot, in my opinion, be read as in any way qualifying the order in so far as it discharges the original order of maintenance.

If that construction be right, there is really nothing left in the argument. However, it was tentatively suggested by counsel for the respondent, though not pressed, that, if this order, upon its true construction, discharges the original maintenance order, and thereby deprives the court of the statutory power of varying that order, which, apart from discharge, would have remained in its hands, it must be regarded as something which the court had no jurisdiction to do.

It was suggested—and reference was made in support of the suggestion to some observations of LORD ATKIN in *Hyman* v. *Hyman* (2)—that the law does not allow the wife by any bargain to deprive the court of the power to vary an order for maintenance, once it has been made. In other words, such an order, which is inherently variable, once made, must remain alive for all time, and no consent by the parties can ever put an end to it, and any order of the court purporting to put an end to it would be *ultra vires.* To my mind, that proposition is a startling one. I can see no reason, in the language of the statute, or in the policy of the law, why parties in such circumstances, where an order for maintenance of this nature has been obtained, should not be able by agreement to put an end to it, and to substitute some other provision upon which they may agree. The suggestion that, once an order for maintenance is made, it is indestructible, seems to me to be based upon an extravagant construction of the Act of Parliament, and upon an extravagant view of public policy. It is an argument which I cannot accept, but, as I think I have said, counsel for the respondent really did not press it. He was, moreover, in the further difficulty, which I need not discuss, that this order, in so far as it exercises, or purports to exercise, a jurisdiction which the court conceives itself to have, is one which, on ordinary principles, would be binding upon the parties, not merely according to its terms, but as impliedly containing a decision by the court as to its own jurisdiction, which could only be upset by the parties on appeal. However, I need not enter into any discussion of that matter, because the suggestion that this order, if it be construed in the way in which, in my opinion, it ought to be construed, was in some way *ultra vires* is one which, as I have already said, I am quite unable to accept.

The position, therefore, is this. The original order went when it was discharged by the order of Oct. 9, 1933. The maintenance petition

was dismissed, and, from Oct. 9, 1933, onwards, there was not in existence any order for maintenance, or any petition asking for maintenance. The slate was clean. Neither the order nor the petition remained in a state of suspended animation. They were gone. In that state of affairs, the present application is launched. As I indicated some time ago, if one treated it as a new application, not linked up to some existing A
order of the court, or to some pending application made in due time, it would be hopelessly out of time under the section. The argument as presented was one which, if I may say so, showed a true appreciation of what I conceive to be the law upon this matter—namely, that, if one is dealing with an application which, if it were a new application, would B
be out of time, and beyond the jurisdiction of the court, one must find a peg upon which, so to speak, one can hang it, a peg which had been put in place within the jurisdiction of the court. I think that that appears very clearly in *Stephen* v. *Stephen* (3), and I shall not be wasting time if I refer to that case and the nature of the question which there C
arose. An order was made by the registrar, upon application for maintenance, for payment of a certain sum by the respondent to the petitioner by way of maintenance of the children of the marriage. The order then proceeded as follows : D

> No order for maintenance of wife ; but liberty to apply thereon.

The matter came before the President, and eventually to this court. One of the questions which arose was whether the words " liberty to apply " should be allowed to remain in the order. If I may put it in my own language, the vice of those words lay in the fact that the order E
appeared to contemplate that a subsequent application for maintenance by the wife would be one which the court would have jurisdiction to entertain. Be it observed that, no order for maintenance having been made, no question could arise as to any variation, because the court's power to vary depends upon there being in existence an order for main- F
tenance which can be varied. The effect of putting in the words " liberty to apply " was to suggest that, notwithstanding the fact that there was no order for maintenance, the wife would be entitled at some future date to apply for such an order. If she had thereafter applied for such an order, it would, of course, have been a new application, because up to then G
no order had been made. It being a new application, she would be in the difficulty that it would not be an application for an order made " on " the divorce. This court took the view that the insertion of the words " liberty to apply " was incorrect. It was pointed out that the proper—and, indeed, the only—method of preserving some right in the wife, H
in such circumstances, was to provide what I have called a peg upon which subsequent applications could be hung. Such a peg could be provided by making an order for periodic maintenance, in a nominal sum, which order would remain in force, and would be susceptible of variation if the circumstances called for it. In the absence of such a

peg, however, no future order could be made, and, therefore, the words "liberty to apply" would be meaningless and misleading.

I think that that concludes all that I need say, but for one matter. The effect of the conclusion to which I have come is that those words should not have been put into the order, because they are not operative A to confer upon the court a jurisdiction which it did not possess. Once the order is discharged, the jurisdiction of the court disappears. If these words, on their true construction, purport to confer upon the court some jurisdiction to revive a discharged order, or to make a new order, notwithstanding that the previous order had ceased to be on foot, they B would purport to confer upon the court by consent a jurisdiction which is not conferred upon the court by statute. In my opinion, they are wrong from that point of view, and words of that kind should not be inserted in these orders in future. They are misleading and meaningless.

There is one further point, before I leave this matter, on the form C of order, on which I should like to comment. I have already said that there is no jurisdiction in the court to order payment to the wife of a lump sum. Such payment can only be consensual. That being so, I take the view that in such cases it is not desirable that the court should direct the payment of such a lump sum, which is merely consensual. D There is no necessity for the court to be appearing by consent to be making an order which it has no jurisdiction to make at all. There are many other ways of providing for these matters. What the court has jurisdiction to do is, of course, to discharge its previous order. The sum can be paid first, in which case all that is required is a recital in the E order that such-and-such an agreed sum has been paid in full satisfaction, and an order by consent that the existing maintenance order be discharged. If the sum has not been paid, I see no reason why the order should not take the form that, upon payment of the sum, the existing order should stand discharged, when the ordinary routine would F be, as is the practice in another division, that, upon the party producing before the registrar an affidavit verifying the payment, the order can provide that the existing maintenance order should be discharged. There are various methods of putting such an order into a perfectly effective shape without adopting what, to my mind, is the objectionable course G of inserting in the order a direction for payment which the court has no jurisdiction under the statute to make. The result is that the appeal will be allowed, and the application dismissed with costs here and below.

GODDARD, L.J.: I agree, and I only want to add one word. We H were told that the Divorce Court has for some time been adding to orders of this nature the words: "This matter not to be reopened without leave of the court." If that is so, it may have been thought that the decision of LORD MERRIVALE, P., in *Olding* v. *Olding* (4) was some justification for those words being added. I think it should be pointed out, as I read that case, and as I read the decision of BATESON, J., in

Jenkins v. *Jenkins* (5), that those cases are no authority for the addition of those words at all. In neither of those cases was there a petition for maintenance.

In *Olding* v. *Olding* (4), the wife having obtained a decree and come to an agreement with her husband, a registrar's summons was taken out to secure an order embodying the agreement, with the consent of A both parties, and the court was asked to make an order. However, there had been no petition presented for maintenance at all. Lord Merrivale, P., decided that an order should be made [143 L.T. 311]:

> . . . in the terms of the summons, setting out that the parties had agreed to it, and that the petitioner would not be at liberty to file a petition for maintenance or B take like proceedings without the leave of the judge.

The order of Bateson, J., in *Jenkins* v. *Jenkins* (5) was in rather a different form and, if I may say so, I think that it was in the preferable form. There he made an order in the following terms [142 L.T. 656]:

C

> By consent. On the petitioner's undertaking not to file any petition for maintenance, whether by way of variation of settlements or maintenance hereafter, order in terms agreed.

Some question might arise as to whether or not, if there is no application for maintenance, that sort of order can be made. It seems to me that, where the parties come to an agreement before the application for D maintenance is made, the more preferable course would be for the wife to file an application for maintenance, and then on her application an order be made in the terms which Sir Wilfrid Greene, M.R., has just pointed out. I can see difficulties, once a decree absolute has been made, in saying that the court has power to make an order in the form in which E Bateson, J., or Lord Merrivale, P., made it. The difficulty is, on what proceedings could they make such an order? The suit is at an end, unless proceedings were taken for maintenance. It seems to me, therefore, that the right procedure is for an application to be made for maintenance, and then for the court to be moved that the application F be dismissed on terms which have been agreed between the parties.

Appeal allowed with costs in both courts.

Solicitors: *Gordon, Dadds & Co.* (for the appellant); *Withers & Co.* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*] G

POTTS *v.* POPE & PEARSON, LTD.

[COURT OF APPEAL (Slesser, Luxmoore and Goddard, L.JJ.), **February 14, 15, 28, 1940.**]

Workmen's Compensation—Review of compensation—Infant workman—Fluctuation of rates of remuneration—Fluctuation of more than 20 *per cent. since* 12 *months previous to review—Whether review includes review upon infant attaining full age—Workmen's Compensation Act,* 1925 (*c.* 84), *s.* 11 (2), (3).

A boy employed as a boy haulier at a colliery was injured in 1924. He was then 14½ years of age. In 1926, he was given light work at the same colliery. In 1931, on attaining the age of 21, he applied for a review under the Workmen's Compensation Act, 1925, s. 11 (2), and the compensation was increased in accordance with the provisions of that section, on the footing that, if uninjured, he would probably have been earning wages as a haulage worker. Between a date 12 months before the review in 1931 and 12 months before Dec., 1938 (when his compensation was reduced), the rates of remuneration of adult hauliers had increased by more than 20 per cent., but the increase in the case of boy hauliers was less than 20 per cent. The workman claimed that he was entitled to an increase in the compensation owing to fluctuations in the rate of remuneration, as provided by sect. 11 (3) of the above Act. The county court judge found as a fact that boy hauliers are in a different class from that of adult hauliers:—

HELD: (i) the review referred to in sect. 11 (3) in the words "if the weekly payment has been previously varied on a review" did not include a review under sect. 11 (2)—that is, a review upon an infant attaining 21 years of age.

(ii) the class of boy hauliers being different from that of adult hauliers, the workman had not continued in the same class of employment within the meaning of sect. 11 (3), or, if he had so continued, the fluctuation in the wage rates was less than 20 per cent., and no further review was possible.

[**EDITORIAL NOTE.** The Workmen's Compensation Act, 1925, s. 11 (3), uses the word "review" quite a number of times, and the question here is whether, when it is used in the parentheses in the middle of the subsection, it can refer to a review under the preceding subsection. The preceding subsection provides that, where an infant workman has been injured, a review may be had within 6 months of his attaining the age of 21 years. The result is that, upon a review based upon fluctuations in the rates of remuneration, the infant's review may be disregarded.

AS TO REVIEW ON FLUCTUATIONS OF WAGES, see WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 376, 377; and FOR CASES, see DIGEST, Vol. 34, pp. 455, 456, Nos. 3735-3737.]

Cases referred to:

(1) *Tarr* v. *Cory Brothers & Co., Ltd.*, [1917] 2 K.B. 774; 34 Digest 455, *3736*; *sub nom. Cory Brothers & Co., Ltd.* v. *Tarr, Cory Brothers & Co., Ltd.* v. *Hopkins*, 86 L.J.K.B. 1340; 10 B.W.C.C. 590; *sub nom. Thomas* v. *Nixon's Navigation Co., Ltd., Tarr* v. *Cory Brothers & Co., Ltd., Hopkins* v. *Cory Brothers & Co., Ltd.*, 117 L.T. 513.

(2) *Bevan* v. *Energlyn Colliery Co.*, [1912] 1 K.B. 63; 34 Digest 414, *3366*; 81 L.J.K.B. 172; 105 L.T. 654; 5 B.W.C.C. 169.

(3) *Brien* v. *Graydon & Co.*, [1936] S.C. 725; 29 B.W.C.C. Supp. 37.

(4) *Dobson Ship Repairing Co., Ltd.* v. *Burton*, [1939] A.C. 590; [1939] 3 All E.R. 431; Digest Supp.; 108 L.J.K.B. 542; 161 L.T. 64; 32 B.W.C.C. 142.

(5) *Hill* v. *Wolverhampton Corrugated Iron Co.*, [1939] 2 K.B. 469 ; [1939] 3 All E.R. 72 ; Digest Supp.; 108 L.J.K.B. 536 ; 161 L.T. 6 ; 32 B.W.C.C. 129.

(6) *Briggs* v. *Dryden (T.) & Sons, Talbot* v. *Vickers, Ltd.*, [1925] 2 K.B. 667 ; 34 Digest 458, *3752* ; 95 L.J.K.B. 275 ; 133 L.T. 409 ; 18 B.W.C.C. 163.

(7) *Moakes* v. *Blackwell Colliery Co., Ltd.*, [1925] 2 K.B. 64 ; 34 Digest 410, *3340* ; 94 L.J.K.B. 723 ; 132 L.T. 819 ; 18 B.W.C.C. 100.

A

Appeal by the applicant from a judgment and award of His Honour Judge Frankland given in the Wakefield County Court on Dec. 19, 1939. The facts and issues are fully set out in the judgment of the court, and were not in dispute. The county court judge said, in a written B judgment, that the applicant's claim clearly involved the cumulative application of subsects. (2) and (3) of sect. 11 of the Act. In 1931, the applicant had been given a notional pre-accident employment and wage. He now sought to graft on to them a benefit based on a fluctuation of the wages of the notional employment. This the county court judge held to C be a misapplication of the Act. If the words in parentheses in subsect. (3) (quoted in the judgment of the Court of Appeal) were omitted, the provisions were quite plain and simple. The workman's actual class of employment was taken as the basis of comparison. Unless the parentheses altered the position, the claim must fail. The object of the D parentheses was clear—namely, in a subsequent review to substitute for the actual pre-accident earnings the notional figure obtained in the previous review, and to base the calculation of fluctuation on that figure. The review was limited to the class of applicants created by the subsection itself by the words "as a result of fluctuations in the E rates of remuneration." On those grounds, the county court judge ignored the previous review in 1931, for the purposes of the present application. However, he found a still more convincing reason for his conclusion. In the absence of authority, he said, he would have held that the words "had the workman remained uninjured and continued F in the same class of employment as that in which he was employed at the date of the accident" referred to the employment in which the workman was engaged before his accident. To hold otherwise would be to bring about a chaotic state of affairs. The words "class" and "grade" were used in the section only when it was dealing with a case in which G it was impossible to compute the rate of remuneration of the man himself and no exactly comparable person was employed by the same employer, and in which the tribunal must compute the earnings of a substitute personality. No such position could be envisaged under sect. 11 (3), where the actual workman was dealt with. His pre-accident earnings H were known, and no meticulous definition was required. It was sufficient to indicate by the words "class of employment" that no change of status was to be contemplated. Subsect. (2) expressly included a possible change of status by appropriate words. The county court judge cited *Brien* v. *Graydon & Co.* (3). He held that the class of employment in the present case was that of a boy haulage hand. The applicant was restricted to a consideration of fluctuation in rates of pay of haulage hands: *Hill* v. *Wolverhampton Corrugated Iron Co.* (5). He therefore dismissed the application with costs.

The applicant appealed, on the grounds that the county court judge
A was wrong in law in holding that the class of employment was that of a boy haulage hand, and that the words "class of employment" referred to the employment in which a workman was actually engaged before his accident, in ignoring the previous review, in holding that the applicant, having previously obtained an increase in the weekly payment
B under the provisions of sect. 11 (2), was not entitled to any further increase under the provisions of sect. 11 (3), and in holding that the words "fluctuation in rates of remuneration" in sect. 11 (3) referred only to "fluctuations in rates of wages."

R. Withers Payne for the appellant.

C *F. W. Beney* for the respondents.

Payne: The appellant's class of employment was that of a haulage hand, not that of a boy haulage hand. The term "class of employment" has a wider meaning than has the term "grade of employment," as is clear from sect. 10 (1), and it is used in the same sense in sect. 11 (3)
D as it is in sect. 10 (1). The appellant's progress from boy haulage hand to adult haulage hand was a change of grade within the same class. Had the appellant remained uninjured, and had he continued in employment as a haulage hand, his average weekly earnings would have increased since the date of the accident, partly by reason of his change
E of grade from boy to adult and partly by reason of a fluctuation in rates of remuneration of haulage hands exceeding 20 per cent. Since the rates of remuneration of haulage hands had increased by more than 20 per cent., then, whether the earlier period to be taken for purposes of comparison was the 12 months preceding the accident or the 12 months
F preceding the previous review, the appellant was entitled to an increase in his compensation. The period to be taken for purposes of comparison was the 12 months preceding the previous review. The words in parentheses in sect. 11 (3) refer to any previous review. This is clear from the final sentence in the section. The distinction between the
G words "section" and "subsection" could not have been made *per incuriam*. The 1923 Act first introduced the time-limit within which the review must take place, and also first introduced the new ground for review—namely, fluctuation in rates of remuneration. It would be surprising if the Acts of 1923 and 1925 had unintentionally deprived an
H infant workman of a right of review after he had attained the age of 21 years, which he had enjoyed under the Act of 1906. If, on a review under sect. 11 (2), a workman who was formerly an infant workman has been placed notionally in a class different from his pre-accident class, he cannot under sect. 11 (3) claim any variation in compensation owing to a fluctuation in rates of remuneration of workmen in that new

class, but he may revert to his pre-accident class if that enables him to show such a fluctuation in rates of remuneration as entitles him to an increase in compensation.

Beney: The Act of 1925, being a consolidating Act, makes no important alteration in the law at the date of its coming into force.
This accident happened in July, 1924, when the Acts of 1906 and 1923 A
were operative. By sect. 15 of the Act of 1923 (the predecessor of sect. 11 (3) of the Act of 1925), successive reviews had all to be under the section—that is to say, the result of the 20 per cent. fluctuation in rates of remuneration. The language of sect. 11 (3), therefore, although
it may be read as having a wider application, ought not to be so con- B
strued, especially because, by the provisions of the Interpretation Act, 1889, s. 38, the rights and liabilities arising out of an accident which occurred before May 1, 1926 (the day on which the Act of 1925 came into force), are preserved by that section: *Talbot* v. *Vickers, Ltd.* (6) and
Moakes v. *Blackwell Colliery Co., Ltd.* (7). If, therefore, sect. 11 (3) of C
the 1925 Act is confined in its operation to successive reviews under its provisions, or under those of sect. 15 of the Act of 1923, there has not been in this case any earlier review under those provisions, because the only earlier review was under sect. 11 (2) of the 1925 Act, the pro-
visions of which are different, and give an infant workman a right to D
receive an increase in compensation independently of any percentage in wage-rise. The workman must show, therefore, that there has been a 20 per cent. increase in the rates of remuneration payable in the class of employment in which he was engaged when he was injured. His
class was that of a boy haulier, in which there has not been any such E
20 per cent. increase. He cannot claim to compare the rates of pay given to boy hauliers in 1924 with the rates given to adult haulage hands in 1938. [Counsel referred to *Brien* v. *Graydon & Co.* (3).]

Slesser, L.J. [delivering the judgment of the court]: The material F
facts of this case, which are not in dispute, may be conveniently summarised as follows. (1) On July 16, 1924, the applicant suffered injury by accident. He was then 14½ years old, and was employed as a boy haulier. His average weekly earnings were 19*s.* 4*d.*—that is, 5¼ shifts
at 3*s.* 3*d.* per week—and an award was made on that basis. (2) In 1926, G
he returned to light work, and received appropriate compensation. (3) In Mar., 1931, the applicant, being still an infant in receipt of 17*s.* 7*d.* per week wages, applied for a review under the Workmen's Compensation Act, 1925, s. 11 (2). The applicant claimed that, had he remained un-
injured, he would probably have been earning at the time of the review H
the wages of a worker at the coal face. The respondents contended that he would probably have been a haulage hand earning £1 9*s.* 2*d.*—that is, 3.86 shifts at 7*s.* 5½*d.* per shift. This latter view was accepted by the court, and, the applicant's pre-accident earnings thus being notionally raised to £1 9*s.* 2*d.*, his actual earnings being 17*s.* 7*d.* per week,

an award of 8*s.* per week was made. (4) Thereafter, owing to increases in the applicant's actual earnings, from Dec. 4, 1938, to £1 4*s.* 4*d.* per week, the amount payable under the award fell to 3*s.* 4*d.* per week. (5) Between a date 12 months before the last review in Mar., 1931 (the review under sect. 11 (2) above-mentioned), and 12 months before Dec., 1938 (when the compensation was reduced from 8*s.* to 3*s.* 4*d.* per week), the rates of remuneration of adult hauliers had increased by more than 20 per cent.—that is, 7*s.* 5½*d.* per shift to 10*s.* 2*d.* per shift. (6) During 1924, and for 12 months before Dec., 1938, the wages of boy hauliers had not increased by more than 20 per cent.—that is, 3*s.* 8*d.* per shift to 4*s.* per shift. (7) This conclusion is in issue. Boy haulage hands are held by the judge to be in a different class from that of adult haulage hands.

The present claim is based primarily on the Workmen's Compensation Act, 1925, s. 11 (3), though, as will appear, it involves an application of sect. 11 (2) to subsect. (3), and it is put thus. It is said that, in so far as there has been admittedly an increase in the rates of remuneration for adult haulage workers during the period of 12 months previous to the review of 1931 and the 12 months previous to Dec., 1938, from 7*s.* 5½*d.* to 10*s.* 2*d.* per shift—an increase of more than 20 per cent.—this workman is now entitled to have his weekly payment varied so as to make it such as it would have been if the rates of remuneration obtaining during the 12 months previous to the present claim for review had obtained during the 12 months previous to the accident. In other words, it is contended that the pre-accident wage, which has been raised notionally under sect. 11 (2) from 19*s.* 4*d.* to £1 9*s.* 2*d.*, should now further be raised notionally under sect. 11 (3) from £1 9*s.* 2*d.* to £2 13*s.* 4d. —that is, 5¼ shifts at 10*s.* 2*d.* per shift. The applicant's present wages are £1 4*s.* 4*d.* per week. This results in a deficiency due to the accident of £1 9*s.*, and he claims half of this—14*s.* 6*d.* per week—as compensation.

Sect. 11 (3), on which the workman must ultimately rely to make good his claim, provides as follows:

> Where the review takes place more than 6 months after the accident, and it is claimed and proved that, had the workman remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the 12 months immediately preceding the review would, as a result of fluctuations in rates of remuneration, have been greater or less by more than 20 per cent. than his average weekly earnings during the 12 months previous to the accident (or if the weekly payment has been previously varied on a review during the 12 months previous to that review or the last of such reviews), the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the 12 months previous to the review had obtained during the 12 months previous to the accident. For the purposes of this subsection "review" includes a review under the provision of any Act repealed by this Act corresponding to this section.

In order to avail himself of Mar., 1931, as a date of comparison to ascertain the alleged 20 per cent. increase in fluctuation of wage rates, the applicant must depend upon the variation of weekly payments on a review mentioned in the parentheses of sect. 11 (3), and the definition of "review" in that subsection. It is argued in the first place that this inclusive definition of the word "review," which is said to include under the words "corresponding to this section" not only the repealed sect. 15 of the 1923 Act (now subsect. (3)) but also the repealed proviso of subsect. (16) of the first schedule of the 1906 Act (now subsect. (2)), and also the provisions of the first part of para. 16 of the first schedule of the 1906 Act (now subsect. (1)), is sufficiently wide to cover a review under subsect. (2) which corresponds with the provision of Sched. 15 of the 1906 Act, and is repealed by this Act, and that, therefore, the word "review" in the parentheses of the operative words of sect. 11 (3) of the 1925 Act—namely, "or if the weekly payment has been previously varied on a review"—must include by definition the review by the infant in 1931, when the pre-accident wage of £1 9*s.* 2*d.* per week as a haulier was notionally attributed to him.

In our view, the argument is fallacious. The definition of the word "review" which I have cited from sect. 11 (3) of the 1925 Act was, we think, intended solely to keep alive for purposes of comparison of rate fluctuations, reviews made under corresponding provisions before the passing of the consolidating Act of 1925, which provisions are only to be found in the Workmen's Compensation Act, 1923, s. 15, the language whereof is repeated verbatim in sect. 11 (3) of the consolidating Act of 1925. One reason which supports this view arises from the necessary inclusion of a review in subsect. (3), on the appellant's assumption, of the provisions of sect. 11 (1)—that is, a general right to review on a change of circumstances.

Before 1923, there were no means of obtaining a review of the notional pre-accident wage on the ground of fluctuation of wages. The review producing a notional pre-accident wage on the basis of infancy dates back to 1906, but a general fall in wages constitutes, among other matters, a change of circumstances entitling the employers to a review under sect. 11 (1), as a rise of wages may entitle a workman to a review: *Tarr* v. *Cory Brothers & Co., Ltd.* (1), but such a general right to review is, of course, entirely different from the notional raising or lowering of the pre-accident wage produced by sect. 15 of the 1923 Act. Nevertheless, on the appellant's argument, a review under sect. 11 (1) equally with a review under sect. 11 (2) would be, by definition, a review under sect. 11 (3) from the date of which the percentage change in rate fluctuations might be ascertained.

Another objection to the appellant's case is that the purpose of an infant's review under sect. 11 (2) is to produce a notional pre-accident figure, based on a probability of earning at the date of review if the infant had remained uninjured. A review under subsect. (3) is to produce a notional pre-accident figure based upon its being proved that, if the workman had remained uninjured, and had continued in the same employment, there would actually have been the necessary fluctuation in rates of remuneration. Sect. 15 of the 1923 Act, now re-enacted in sect. 11 (3) of the 1925 Act, was intended to give a limited statutory recognition to the decision in *Bevan* v. *Energlyn Colliery Co.* (2) in the case of fluctuation of wages, and is a provision entirely separate from any other right to review. We agree with the county court judge in his conclusion that the review mentioned in sect. 11 (3) is limited to that class created by the subsection itself. It is to be noted that sect. 15 of the Act of 1923 speaks in terms of review under "this section," and, but for the change in the ambit of the word "section" in sect. 11 (3) of the 1925 Act, so as to make it possible to argue that it appears to include the provisions of subsects. (1) and (2), the contention as to the extended meaning of the word "review" before 1925 to include the review of 1931 would have been impossible.

It follows that, when the Act of 1925, which is merely a consolidation Act, defines "review" in sect. 11 (3), it does not alter the position as it existed before the passing of that Act. It follows that in this case there never has been any review under sect. 11 (3) before the claim in this case—the infant's review in 1931 must be disregarded—and, therefore, the case now falls to be considered as if the words in parentheses in sect. 11 (3) had no application. The result is that the only two dates to be considered are (i) the date of the accident in 1924, when the applicant was a boy haulier, and (ii) the 12 months before 1938.

In order to make the comparison of fluctuation required by sect. 11 (3) of the 1925 Act, it is necessary that the workman should be considered not only to have been uninjured but also to have "continued in the same class of employment." It is found by the county court judge that in 1924 the applicant was in the class of boy hauliers, which is a class as different from that of adults as apprentices may be from journeymen: *Brien* v. *Graydon* (3). If he is to be deemed to have continued in that boy class in 1938, the fluctuations in rate would have been less than 20 per cent. (see the county court judge's finding). If, to take a view corresponding more nearly to actual facts, he has passed from the class of boy haulier to that of adult haulier, then he has not continued in the same class. His notional pre-accident wage having been settled as a result of the application under sect. 11 (2), on his claim for review made 6 months after the workman attained the age of 21 years (see the Workmen's Compensation Act, 1926, s. 1), no further review is possible. His notional pre-accident wage is irrevocably fixed. This, we think, is implicit in the decision of the House of Lords in *Dobson Ship Repairing Co., Ltd.* v. *Burton* (4), and any further change is due to a decreasing difference between the pre-accident wage so notionally fixed and the increase in his actual wage due to his increasing age. This appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Corbin, Greener & Cook*, agents for *Raley & Sons*, Barnsley (for the appellant); *Barlow, Lyde & Gilbert*, agents for *Day & Yewdall*, Leeds (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

PUBLIC TRUSTEE *v.* PEARLBERG.

[Court of Appeal (Slesser, Luxmoore and Goddard, L.JJ.), **February 21, 22, 23, March 6, 1940.**]

Sale of Land—Waiver of right of rescission—Action for specific performance still on file when notice of rescission served—Validity of notice.

By an agreement dated Jan. 29, 1932, the appellant contracted to purchase a property for £2,400, of which £240 was then paid as a deposit. Clause 27 provided that, if the purchaser should neglect, or fail to comply with, the conditions of sale, the vendor might "give him notice in writing to remedy such neglect or failure, and if after the expiration of 14 days from the receipt of such notice the purchaser shall still be in default, his deposit may be absolutely forfeited to the vendor and the contract rescinded." The purchaser having failed to complete on the appointed day, the vendor, on Nov. 9, 1932, issued a writ claiming specific performance of the agreement, and damages in addition to, or in substitution for, specific performance. The purchaser entered an appearance on July 12, 1933. No proceedings on the writ were ever taken, but the action was not discontinued or dismissed for want of prosecution, and so remained operative, though dormant, at all material times. On Oct. 13, 1933, the vendor gave the purchaser notice under cl. 27 that, unless payment was made within 14 days, the contract would be rescinded, and the deposit forfeited, and on Oct. 28 he wrote saying that the matter must be considered as at an end. On July 9, 1936, the Public Trustee, as trustee of the vendor's will, brought action against the purchaser claiming certain ground rent, and the purchaser counterclaimed for £240, the amount of the deposit paid in pursuance of the agreement:—

Held: as the action for specific performance was still pending, it stood as a plea on the record asserting the existence of the contract, and asserting that the purchaser was still not out of time in completing it. The notice under cl. 27 was, therefore, invalid, and as the vendor had, by means of the notice and subsequent letter, purported to rescind the contract, the purchaser was entitled to a return of the deposit which had been paid.

[**EDITORIAL NOTE.** The authorities are clear that before the Judicature Act, 1875, the presence of a bill for specific performance on the file of the Chancery Court was a bar to a rescission of the contract. Since 1875, it has been possible to claim on one writ both specific performance and, in the alternative, rescission, but the writ here was only indorsed with a claim for specific performance or damages in substitution. Such a writ supposes that the contract is still on foot and binding on the parties, and a notice purporting to rescind the contract while such an action is on the file of the court is wholly inoperative.

As to Waiver of Right to Rescind a Contract for Sale of Land, see HALSBURY, Hailsham Edn., Vol. 29, pp. 289, 290, para. 381; and for Cases, see DIGEST, Vol. 40, pp. 97, 98, Nos. 749-755.]

Cases referred to:

(1) *Gray* v. *Fowler* (1871), L.R. 8 Exch. 249; 40 Digest 162, *1314*; 42 L.J.Ex. 161; 29 L.T. 297; *on appeal* (1873), L.R. 8 Exch. 275.

(2) *Warde* v. *Dixon* (1858), 28 L.J.Ch. 315; 40 Digest 88, *677*; 32 L.T.O.S. 349.

(3) *Duddell* v. *Simpson* (1866), 2 Ch. App. 102; 40 Digest 96, *740*; 36 L.J.Ch. 70; 15 L.T. 305.

(4) *Hipgrave* v. *Case* (1885), 28 Ch.D. 356; 40 Digest 260, *2259*; 54 L.J.Ch. 399; 52 L.T. 242.

(5) *Howe* v. *Smith* (1884), 27 Ch.D. 89; 40 Digest 226, *1959*; 53 L.J.Ch. 1055; 50 L.T. 573.

(6) *Palmer* v. *Temple* (1839), 9 Ad. & El. 508; 40 Digest 228, *1981*; 8 L.J.Q.B. 179.

(7) *Isaacs* v. *Towell*, [1898] 2 Ch. 285; 40 Digest 97, *746*; 67 L.J.Ch. 508; 78 L.T. 619.

(8) *Motor Carriage Supply Co., Ltd.* v. *British & Colonial Motor Co., Ltd.* (1901), 45 Sol. Jo. 672; 40 Digest 98, *753*.

(9) *Joyce* v. *De Moleyns* (1845), 2 Jo. & Lat. 374; 40 Digest 154, case *c*.

APPEAL by the defendant from a judgment of CROOM-JOHNSON, J., delivered at Manchester on July 13, 1939. The facts and the arguments are fully set out in the judgments of SLESSER and LUXMOORE, L.JJ.

A. T. Denning, K.C., and *David Weitzman* for the appellant.

J. Neville Gray, K.C., and *George Maddocks* for the respondent.

Denning, K.C.: So long as the contract is in being, the deposit is not forfeited. It is money in the hands of the vendor, to be applied on completion in part payment. If the vendor lawfully rescinds under the appropriate condition, then perhaps, as upon a repudiation by the purchaser, the deposit is forfeited: *Howe* v. *Smith* (5), at p. 99, and WILLIAMS ON VENDOR AND PURCHASER, 4th Edn., Vol. 1, pp. 1006, 1007. If, however, the vendor does not lawfully rescind on one or other of these grounds, but resells or repudiates while the contract remains in being, the deposit is not forfeited, but must be returned to the purchaser as money had and received to his use. The reason is that the vendor has put it out of his power to fulfil the contract, and therefore must return the deposit: WILLIAMS ON VENDOR AND PURCHASER, 4th Edn., Vol. 1, p. 1012, and *Palmer* v. *Temple* (6). There is no lawful rescission under the condition in the contract, because of the action for specific performance. The rule is, perhaps, not one of election properly so-called, but is a rule that, so long as the action is in being, it is a continuing affirmation of the contract, and a party cannot rescind without first getting rid of the action. [Counsel referred to *Warde* v. *Dixon* (2), *Gray* v. *Fowler* (1), *Hipgrave* v. *Case* (4), *Isaacs* v. *Towell* (7), *Motor Carriage Supply Co., Ltd.* v. *British & Colonial Motor Co., Ltd.* (8).]

Gray, K.C.: A party cannot both approbate and reprobate. However, although the filing of a bill was approbation, the issue of a writ, even without an alternative, was not a definite approbation, and something more was necessary. For instance, the contract would be absolutely approbated if the plaintiff delivered a statement of claim pleading that he was ready and willing to complete. This writ was a writ in the alternative, because it asked for specific performance, and damages in addition, or in substitution. In *Gray* v. *Fowler* (1), the important fact was that the action was commenced by bill. *Joyce* v. *De Moleyns* (9) was decided on its own facts.

SLESSER, L.J.: This appeal arises on a counterclaim by Henry Hyman Pearlberg in a suit in which the Public Trustee, who, on the death of one Scholfield, executor of the vendor, became executor of

Scholfield, and so administered the vendor's estate, had successfully claimed £47 13*s.* 1*d.*, the half-year's ground-rent, less tax, on certain property. Nothing here turns upon that claim, which was allowed with costs. On the counterclaim, Pearlberg claimed £240, the amount of a deposit paid to one Thomas Greaves by him on Jan. 29, 1932, in respect of the sale by Greaves to Pearlberg of a factory called the Albany A Mill, Oldham, together with interest at 4 per cent. from that date and damages. The counterclaim was dismissed with costs. The present appeal is limited to so much of the counterclaim as concerns the deposit.

The contract under which admittedly the deposit was paid was for the sale and purchase of a freehold cotton-mill, subject to a term of B 999 years, with the benefit of a yearly rent of £271 5*s.* reserved by the lease creating the term. The sale was to be for £2,400, and a receipt for the deposit was given to the purchaser on Jan. 29, 1932, by the vendor's solicitors. The date of completion is stated in the contract to be Mar. 1, 1932. By cl. 27, it was provided that, if the purchaser should C neglect or fail to comply with any of the conditions of sale, the vendor

> . . . may give him notice in writing to remedy such neglect or failure, and if after the expiration of 14 days from the receipt of such notice the purchaser shall still be in default, his deposit may be absolutely forfeited to the vendor and the contract rescinded.

D

The date for completion having passed, on Apr. 6, 1932, Scholfield & Co., solicitors for the vendor, gave notice to Pearlberg that, unless he completed, they would take action under the agreement, and on June 28, 1932, they notified the solicitors for the purchaser that they had received instructions to commence proceedings for specific performance of the E agreement, and damages in addition to, or in substitution for, specific performance.

On July 7, Greaves issued his writ accordingly, but the judge says that he is not satisfied that that writ was ever served. Shortly after, Greaves died, and on Nov. 9, 1932, Scholfield, as executor of Greaves, F served a fresh writ for the same relief in the Palatine Court of Lancaster. That writ was not served upon Pearlberg until July 4, 1933. On July 12, appearance thereto was entered for Pearlberg. No proceedings on this writ were ever taken, but the writ was never taken off the file, and remained operative, though dormant, at all material times. G

Next, Pearlberg, having done nothing to complete the purchase, on July 6, 1933, excused himself on the ground that he had difficulties in getting the purchase money. Thereafter, on Oct. 13, 1933, Scholfield, in place of the vendor, gave notice to the purchaser under cl. 27 of the agreement that, unless payment was made in 14 days, the contract H would be rescinded and the deposit forfeited. On a further appeal for time by the purchaser on Oct. 24, Scholfield's solicitors, on Oct. 26, 1933, say that, if the purchaser can raise the necessary funds within, say, 15 days, they are of opinion that the vendor might be prepared to make a fresh agreement with the purchaser, and, on completion, give him credit for the deposit already paid. On Oct. 28, however, they write as follows:

> As your client has failed to comply with the terms of the notice dated Oct. 13, we have received definite instructions from our client that the contract must be rescinded and the deposit forfeited. The matter must, therefore, be considered as at an end.

A Nevertheless, on Nov. 1, 1933, the purchaser says through his solicitors
that he is prepared to complete on or before Nov. 30, and to pay the
further sum of £200 immediately on account. This offer is rejected on
Nov. 2 by Scholfield, whose solicitors write as follows:

> Our client, however, is not prepared in any circumstances whatever to reopen
> B the question of the contract which has been rescinded by the notice served on
> your client.

The vendor then goes on to offer what he describes as "an entirely new
contract." On Nov. 3, 1933, in answer, the purchaser still says he is
willing to complete the purchase, but suggests that, if a further contract
C is to be entered into:

> . . . we shall be glad to know if you will be prepared to sell at the original price of £2,400, plus interest, and to give credit for the deposit already paid, less your costs.

The suggestion for a new contract is again discussed by the vendors on
D Nov. 6, 1933, and on Nov. 11, 1933, the purchaser points out for the
first time that he has not been given notice of discontinuance of the writ
for specific performance, and that he intends to tender the money in
respect of the purchase. In his evidence at the trial, Pearlberg tried
to prove that he did so tender; but the judge rejected all his evidence,
E and held that he did not tender, and that he knew he could not com-
plete in accordance with the notice, and had no money available. I
exclude from my consideration, therefore, any question of Pearlberg
tendering any money at all, and assume that he ignored the notice of
Oct. 13, 1933. I have considered the history of the case from the
F correspondence alone.

From the letters and notice, it is clear that, by the notice of Oct. 13,
1933, Scholfield purported to rescind the contract. On Oct. 28, after
the 14 days had expired, he stated that the matter must then be con-
sidered as at an end. He was prepared to negotiate for "an entirely new
G contract," and told the purchaser so on Nov. 2, but beyond question
he had repudiated the original agreement. If he was entitled to rely
on the notice of Oct. 13, he was within his rights in so doing, and in
forfeiting the deposit. If, however, as argued for the appellant, that
notice was a nullity, the Public Trustee, in place of Scholfield, can show
H no case for retaining the deposit paid upon an agreement which Scholfield
has purported to rescind, and must fail on this appeal.

The whole question, therefore, in my opinion, turns upon the validity of the notice. That Pearlberg was in default is not disputed, but it is said for the appellant that, by failing to discontinue the action for specific performance, further time has been given to Pearlberg to complete before the hearing of that action, and that he had taken out of their own hands, and delegated to the court, the burden of deciding at what date the contract should be completed.

Had the action been started by bill in the Court of Chancery before the Judicature Acts, it could scarcely be doubted that, in the circumstances of this case, the notice served on Pearlberg, under cl. 27 of the A contract of Jan. 29, 1932, would be inoperative so long as the bill was on the file of the court. Authority for this proposition is to be found in *Gray* v. *Fowler* (1), approving *Warde* v. *Dixon* (2) to that effect, a doctrine now to be found in all the current textbooks. A vendor may rescind, notwithstanding that a bill has been filed, if and when the bill B is dismissed. As KELLY, C.B., points out in *Gray* v. *Fowler* (1), speaking of the practice of the Court of Chancery, at p. 272:

> . . . the seller cannot, while his bill for specific performance is pending, put an end to the contract; he must first dismiss his bill with costs. But the whole meaning and essence of that rule (which is a very reasonable rule) is this: You cannot be C acting on the contract and assuming it to exist, and at the same time exercising a right to put an end to it by rescinding it.

In that case, it was held that the seller had taken all the means in his power to obtain a dismissal of the bill with costs, and, on the facts, the parties were remitted to their original rights. In the present case, D however, the respondents have done nothing to have the writ taken off the record, nor has the purchaser in any way waived his rights to say that the vendor cannot rescind while he still has on the record a writ claiming specific performance against him on the basis that the contract still exists, and that, consequently, he is entitled to say that he is not E now out of time, and, therefore, not in default under cl. 27 of the contract.

The judge finds, in a passage of KELLY, C.B., in *Gray* v. *Fowler* (1), at p. 275, authority for the proposition that, by giving notice after the writ, a new ground for rescinding the contract is brought into existence. F With respect, I think this conclusion to be erroneous. KELLY, C.B., is there dealing with a case where, to quote his own words, at p. 271,

> . . . the seller was entitled to rescind. [His right] had, at the time when the bill was filed, altogether ceased to exist, but was now renewed and revived when the purchaser by his answer insisted on the objection.

G

That is to say, in *Gray* v. *Fowler* (1), notwithstanding that the seller, by filing his bill, had elected not to rescind, on the original objections to title, yet there came a time when, again to quote KELLY, C.B., at p. 272:

> . . . the suit for specific performance is at an end; and therefore the parties are remitted to their original rights.

H

The Court of Exchequer Chamber, on the facts, deciding that the defendant was entitled to rescind on account of the particular objection raised by the answer, did not question the general proposition laid down in *Warde* v. *Dixon* (2) by KINDERSLEY, V.-C., at p. 315, that the bill must be dismissed before the right to rescind could be exercised.

In *Gray* v. *Fowler* (1), BRAMWELL, B., expressly speaks of the rule, declaring it thus, at p. 268:

> . . . you cannot rescind a contract whilst you have a bill upon the file insisting upon it; you must first of all get rid of the bill; that is all the rule amounts to.

Approval is also expressed by MARTIN, B., at p. 270. The observations A of CLEASBY, B., at p. 261, that "the mere circumstance of a bill having been filed does not prevent a vendor from rescinding," is not inconsistent with the general rule: *Duddell* v. *Simpson* (3). As he states, *Warde* v. *Dixon* (2) assumes that the bill must be dismissed with costs before the right to rescind can be exercised. However, the vendor may recover B his power to rescind, provided he gets rid of his bill.

There remains the point, strenuously argued by counsel for the respondent, that the principle stated above, which has been applied to bills in Chancery, cannot properly be acted upon in the case of a writ under the present procedure claiming specific performance. If the writ C is equivocal in nature, whereby a statement of claim claiming rescission could be made on a writ for specific performance, I think that there would be force in the argument that such a writ did not necessarily involve action on the contract, and an assumption of its existence. In my opinion, however, the writ in the Palatine Court is not of that order.

D The claim indorsed on the writ of Nov. 9, 1932, was for specific performance of the agreement of Jan. 29, 1932, and for damages in addition to, or in substitution for, specific performance. The claim for damages in the alternative, in my view, is merely ancillary to the claim for specific performance, and the relief claimed is on the basis of the continued E existence of the contract which the defendant is failing to carry out. In *Hipgrave* v. *Case* (4), the principle of *Gray* v. *Fowler* (1) was applied to a statement of claim. In that case, as here, the plaintiff claimed specific performance, or damages in substitution of performance (*per* the EARL OF SELBORNE, L.C., at p. 361), the only difference being that, the F present claim having gone no further than the writ, there is no express averment that the plaintiff is willing and ready to perform the contract. However, even if there had been a statement of claim, by R.S.C., Ord. 3, r. 14, and the corresponding practice of the Palatine Court, it is no longer necessary to plead averments, and such an averment is implicit in the G claim for specific performance.

It follows that, as the action for specific performance has never been discontinued, dismissed for want of prosecution, or waived, it stands as a plea on the record asserting the existence of the contract, and asserting that the defendant is still not out of time to complete it. H Indeed, it is sought to make the court compel him to do so. The answer would be that, owing to the absence of default on his part, in the circumstances the notice of rescission of the contract or claim to forfeit the deposit is bad. The plaintiff himself having repudiated the contract, if not by the notice, at any rate by the letter of Oct. 28, stating that the contract is at an end, he has lost his title to the deposit, and the defendant may claim it back, as he has sought to do in the present counterclaim. I am of opinion that this appeal succeeds, with costs. The order of the court will be as stated by LUXMOORE, L.J., in his judgment.

LUXMOORE, L.J.: This appeal arises out of a counterclaim made by the defendant Henry Hyman Pearlberg in an action brought against him in the King's Bench Division on June 9, 1936, by the Public Trustee as trustee of the will of one James Greaves deceased. By an order, dated July 3, 1936, it was ordered that the Public Trustee should be at liberty to enter final judgment for the amount of his claim in the action and costs, and it was further ordered that, if that amount and costs were paid into court within 10 days from the date of the order, execution on the judgment should be stayed pending the trial of the defendant's counterclaim. The money was duly paid into court, and the counterclaim was delivered on Sept. 8, 1936. It was based on a written agreement, dated Jan. 29, 1932, entered into by Pearlberg and James Greaves. The agreement was annexed to printed particulars and special and general conditions of sale, and provided that Greaves should sell, and Pearlberg should purchase, the property described in the particulars at the price of £2,400, subject as in those particulars mentioned, and also subject to the special and general conditions already mentioned, so far as the same were applicable to a sale by private treaty. The particulars described a plot of land at Oldham, together with a cotton mill called Albany Mill and other buildings erected thereon, subject to a term of 999 years created by a lease, dated May 21, 1896, but with the benefit of the yearly rent of £271 5*s*. thereby reserved. I will hereafter refer to this property as Albany Mill. The special conditions of sale stated that the purchase should be completed on Mar. 1, 1932, and by the general conditions it was provided by cl. 3 that the purchaser should, immediately after the sale, pay to the vendor a deposit of 10 per cent. of the purchase money, by cl. 4 that the purchaser should, as from the day for completion, be entitled to possession or receipt of the rents of the property, and should pay all outgoings affecting the same, but should not be let into actual possession or receipt of the rents until payment of the remainder of the purchase money and execution and delivery of any conveyance which ought to be executed by him, and by cl. 5 that, if from any cause whatever, save as thereinafter provided, the purchase should not be completed at the time appointed, the purchaser should pay interest on the remainder of the purchase money at the rate of 5 per cent. per annum from that time until the same should be paid, or the vendor might at his option retain the rents or an apportioned part thereof to the actual completion of the purchase in lieu of interest, and should in that case discharge the outgoings, or an apportioned part thereof, to the same time. By cl. 27, a power to rescind the contract for sale was conferred on the vendor in these terms:

> If the purchaser shall neglect or fail to comply with any of the conditions of sale

> the vendor may give him notice in writing to remedy such neglect or failure and if after the expiration of 14 days from the service of such notice the purchaser shall still be in default his deposit may be absolutely forfeited to the vendor and the contract rescinded.

As an alternative to rescission, the vendor was given power to resell the property on the terms stated in this clause, but it is not material to refer A to them.

On Jan. 29, 1932, Pearlberg paid to Greaves a deposit of £240, in accordance with the provisions of cl. 3 of the general conditions. The object of Pearlberg's counterclaim is to recover (i) the deposit of £240, with interest at 4 per cent. per annum from Jan. 29, 1932, until repay- B ment, and (ii) general damages for the breach of the agreement of Jan. 29, 1932, for the sale of the Albany Mill. The counterclaim was only set down for trial on May 4, 1939, as the result of an application by the Public Trustee to dismiss the counterclaim for want of prosecution. It was heard by CROOM-JOHNSON, J., on July 13, 1939. The judge C directed that judgment should be entered for the Public Trustee on the counterclaim, with costs to be taxed. Pearlberg has appealed to this court from so much of the order as relates to the counterclaim, and asks that judgment may be entered for him on the counterclaim.

It is necessary to state the history of the agreement of Jan. 29, 1932, D between its date and the date of the counterclaim. The vendor's title was accepted in due course on Pearlberg's behalf, and a draft conveyance was submitted by his solicitors to the solicitors for Greaves, who approved the draft. On Mar. 23, 1932, Greaves' solicitors asked for an appointment to complete. There was some further correspondence E between the solicitors without result, and on June 17, 1932, Greaves' solicitors again wrote asking for an appointment to complete. Ultimately, on July 7, 1932, a writ was issued in the Chancery of the County Palatine of Lancaster on behalf of Greaves, as plaintiff, against Pearlberg, claiming specific performance of the agreement of Jan. 29, 1932, and F damages in addition to, or in substitution for, specific performance. The judge stated that he was not satisfied that this writ was served on Pearlberg.

Greaves died on July 24, 1932. No further step was taken in the action, and no application was made to revive it. This action may, for the G purposes of the counterclaim, therefore, be treated as non-existent. Greaves appointed as his executor Thomas Henry Scholfield, a member of the firm of solicitors who had acted for him in connection with the agreement, and on Nov. 9, 1932, Scholfield issued a new writ in the Chancery of the County Palatine of Lancaster against Pearlberg asking H for precisely the same relief as was asked by the earlier writ. Nothing further was done in the matter until July 4, 1933, when the writ in the second action was served on Pearlberg, who entered appearance to it on July 12, 1933. On Oct. 13, 1933, a notice on behalf of Scholfield was served on Pearlberg requiring him :

> . . . forthwith to comply with the terms of the agreement of Jan. 29, 1932, and

to complete the purchase of the Albany Mill the day fixed by the contract for completion being now long past.

The notice ended with the following paragraph:

> We hereby give you further notice that should you fail to complete the said purchase within 14 days from the service upon you of this notice the said Thomas Henry Scholfield will rescind the contract and the deposit paid by you will be forfeited under the terms of cl. 27 of the general conditions of sale of the contract. A

This notice apparently elicited a request from Pearlberg for a completion statement up to Friday, Oct. 27, 1933, for on Oct. 19, 1933, Scholfield's solicitors wrote to Pearlberg a letter enclosing such a statement. The letter asked that the engrossment of the draft conveyance which had already been approved should be sent for execution by B the vendor, and that an appointment to complete should be made. The completion statement enclosed was not in accordance with the agreement of Jan. 29, 1932, in that it required payment of the sum of £303 4*s.* 2*d.* in respect of the ground rent of the Albany Mill which had C not been received by Pearlberg, and the sum of £20 for the costs of the second action, the total sum claimed to be payable by Pearlberg on completion being £2,483 4*s.* 2*d.*

On Oct. 24, 1933, Pearlberg's solicitors wrote to Scholfield's solicitors saying that the purchaser had informed them of his inability to find the D balance of the purchase price within the 14 days mentioned in the notice, and asking for an extension of time for two or three weeks. They pointed out that the completion statement was incorrect, and asked what steps had been taken against the liquidator of Albany Mills, Ltd., the company which had been in occupation of the Albany Mill, by E way of protection of the rent-owner's rights. To this letter, Scholfield's solicitors replied on Oct. 25, 1933, that, if Pearlberg could raise the necessary funds within 10 days, they were of opinion that Scholfield would be prepared to make a fresh arrangement with him, and, on completion, give him credit for the deposit already paid. On Oct. 28, F 1933, Scholfield's solicitors wrote again to Pearlberg's solicitors, and said:

> As your client has failed to comply with the terms of the notice dated Oct. 13, we have received definite instructions from our client that the contract must be rescinded and the deposit forfeited. The matter must therefore be considered as at an end. G

Apparently, there were conversations between the solicitors, because on Nov. 1, 1933, Pearlberg's solicitors wrote to Scholfield's solicitors a letter and referred to conversations and stated that their client was prepared to complete on or before Nov. 30, and to pay the further sum H of £200 immediately on account. This letter was answered on the following day by a letter stating that Schlofield was not prepared

> . . . to open the question of the contract which has been rescinded by the notice served on your client.

The letter went on to suggest that, if Pearlberg still desired to purchase the property, he must enter into a new contract. The subsequent correspondence suggested that Pearlberg might be willing to enter into a further contract, but no new contract was made.

On Nov. 11, 1933, Pearlberg wrote to Scholfield's solicitors pointing out that notice of discontinuance of the second action had not been given to him, and that, before such a notice as that of Oct. 13, 1933, could be given, notice of discontinuance of that action was necessary. He stated that he proposed to tender the purchase money under the purchase agreement on Nov. 13, and asked for a corrected completion statement. The judge has held that no tender was made on Nov. 13, 1933, nor on any other date. He declined to accept the testimony of Pearlberg unless it was supported by documentary evidence, and, having read the shorthand note of Pearlberg's examination and cross-examination, I appreciate entirely the reason for this finding.

From the last-mentioned date onwards, the question of the completion of the agreement of Jan. 29, 1932, remained, so far as both parties were respectively concerned, in a state of quiescence. On Jan. 14, 1935, Scholfield sold the Albany Mill to a third party. Scholfield died on Apr. 7, 1935, having appointed the Public Trustee as his executor. The Public Trustee thereby became the legal personal representative of Greaves. On Sept. 5, 1935, Pearlberg wrote to Scholfield & Co. stating that he was prepared to complete the purchase of the property:

> . . . which I have been anxious to do all along but which you have prevented my so doing owing to your action for specific performance.

This statement is difficult to understand or to reconcile with the facts. Pearlberg also stated that he proposed forthwith to take proceedings for specific performance of the contract. No such step was taken, nor was anything further heard about the contract until the Public Trustee, who had become the trustee of the will of James Greaves in the place of Scholfield, and also the legal personal representative of James Greaves by devolution, instituted the action out of which Pearlberg's counterclaim has arisen. As I have already stated, there was great delay in bringing the counterclaim to trial, and it was only set down after an application by the Public Trustee for its dismissal for want of prosecution.

Counsel for the appellant very properly admitted that it was impossible for him to put forward a claim for damages for breach of the agreement of Jan. 29, 1932, with any hope of success, having regard to Pearlberg's delay in the prosecution of his claim, but he contended that there was no valid rescission of the agreement of Jan. 29, 1932, in accordance with any of its provisions, and that, consequently, Pearlberg had a legal right to recover his deposit, and that such right was not, and could not be, affected by reason of any delay by Pearlberg in the prosecution of his claim. It is necessary, therefore, to consider the effect on the contract of the notice of Oct. 13, 1933, and the notice of Oct. 28, 1933, that the contract was rescinded. If there had been no pending action by Scholfield for specific performance, there could, I think, be no doubt but that both the notice limiting a time for completion and the rescission after failure to comply with that notice were valid. However, it is, I think well-settled that a vendor cannot rescind a contract for the sale of land where he has himself brought an action for specific performance which is pending at the date of the alleged rescission, for the claim for specific performance of necessity implies A an affirmance of the contract. The rule is stated in these terms in WILLIAMS ON VENDOR AND PURCHASER, 4th Edn., Vol. 1, p. 227 :

> If the vendor takes proceedings to enforce the contract at law or in equity, he waives his right to rescind : though he may revert to it ; if he procures his proceedings to be effectually discontinued at his own cost before the matter comes on to be B heard.

Reference is made to *Warde* v. *Dixon* (2) and *Gray* v. *Fowler* (1) as supporting this statement. KINDERSLEY, V.C., said in *Warde* v. *Dixon* (2), at p. 322 :

> . . . he [the plaintiff] would have to dismiss his bill with costs before he could C say he is entitled to rescind the contract.

Each member of the Court of Exchequer Chamber which decided *Gray* v. *Fowler* (1) refers to the rule in express terms. The reason for the rule is thus stated by KELLY, C.B., at p. 272 :

> Then we are met with a difficulty arising out of the practice of the Court of D Chancery that the seller cannot while his bill for specific performance is pending put an end to the contract : he must first dismiss his bill with costs. But the whole meaning and essence of that rule (which is a very reasonable rule) is this : You cannot be acting on the contract and assuming it to exist and at the same time exercising a right to put an end to it by rescinding it.

This, of course, only deals with the question of rescission, and not with E the question whether a new time for completion can be fixed by the vendor who has started an action for specific performance while that action is pending. Where, as in the present case, time for completion is not of the essence of the contract, it is always open to a vendor to fix a reasonable time for completion, and so make time of the essence, F but, where a vendor starts an action for specific performance, it appears to me that the issue of a writ is equivalent to a notice to the purchaser that he must complete his purchase at a time which will be fixed by the court if the vendor succeeds in his action. The vendor having given notice of this fact, it seems to me to be impossible, while the action G is pending, for him to fix some other and shorter time for completion under some provision of the contract. Of course, if the action for specific performance is discontinued, the right to fix a new time for completion under the contract must necessarily revive. Counsel for the plaintiff did not challenge the existence of the rule as to the vendor's right to H rescind while an action for specific performance instituted by him is pending, but he argued that it did not apply if the vendor showed that he had changed his mind at the time he purported to rescind, and did not then intend to continue his action. In support of this argument, he relied on the fact that in *Warde* v. *Dixon* (2) as well as in *Gray* v.

Fowler (1) the vendor was proceeding by bill of complaint, which required an averment that the vendor was ready and willing to carry out his part of the contract, whereas no such averment was implicit in the writ. I do not think that there is any solid foundation for any such distinction, for the relief of specific performance can only be obtained by a person who can perform his contract, subject only to the question of title, if the title has not already been accepted. I agree that, if the writ is equivocal, and there is a claim for specific performance, with an alternative claim for rescission, the vendor has not in fact made a definite choice in favour of the enforcement of the contract. In the present case, the writ is for specific performance of the contract, and for damages in addition to, or in substitution for, specific performance. On such a writ, I am satisfied that the reference to damages in substitution for specific performance has no reference to a possible claim to rescission, and would not include it. In *Hipgrave* v. *Case* (4), it was held that a claim for specific performance, or, in the alternative, for damages, must be treated as one for specific performance, with a claim for damages in the alternative as a substitute for specific performance. In the present case, the words "in substitution for specific performance," which were absent from the claim in *Hipgrave* v. *Case* (4), are expressly inserted in the writ. In these circumstances, I can see no ground to support the contention of counsel for the plaintiff that the writ is either equivocal or in a form in which he could, by the statement of claim when delivered, ask for rescission of the contract. Counsel for the plaintiff did not find any adequate argument in answer to the question whether a vendor who has instituted an action for specific performance can, while that action is pending, give a notice making time for completion of the essence of the contract, in view of the fact that it is for the court to fix the time for completion in such an action.

It follows from what I have said that, in my judgment, the notice by which Scholfield purported both to fix a date for completion and to rescind the contract because of Pearlberg's failure to complete by that date were ineffectual, and that there has, therefore, been no valid rescission under cl. 27 thereof. If this is so, there cannot have been a forfeiture of the deposit by reason of the notice and Pearlberg's failure to comply with it. Although *Gray* v. *Fowler* (1) was cited to CROOM-JOHNSON, J., it does not appear that his attention was called to that part of the judgment which states the rule to which I have referred. The passage in *Gray* v. *Fowler* (1) to which the judge was referred is in the judgment of KELLY, C.B., at p. 271 :

> Then it is further said by the plaintiff, "You have filed a bill for specific performance against me, and therefore you are not entitled to rescind; you call upon me to act upon the contract, and at the same time claim to rescind and put an end to it." But the state of circumstances under which the seller was entitled to rescind had, at the time when the bill was filed, altogether ceased to exist, but was now renewed and revived when the purchaser by his answer insisted on the objection.

This passage has no bearing on the existence of the rule that a vendor cannot rescind a contract specific performance of which he has sought to enforce by pending action, and is, in fact, directed to a different point. What the judge is saying is that the vendor, by bringing his suit for specific performance, was not entitled to rescind the contract in respect of objections made by the purchaser before the vendor's suit was instituted, but that he became entitled to rescind in respect A of objections made subsequently to the institution of the suit, provided that the suit had, at the time of rescission, been dismissed, for KELLY, C.B., immediately after the passage which I read last, states the difficulty caused by the rule, and, after pointing out that the vendor's suit for specific performance must be dismissed before rescission, proceeds to B demonstrate that the vendor had in the particular case under consideration done everything in his power to obtain a dismissal of his bill with costs, although he had been unable to do so by reason of the death of the purchaser and the attitude adopted by his executor, since the vendor had offered to pay to such executor the costs which would have C been payable to the deceased purchaser if he had been alive and the suit had been effectively dismissed with costs. He further points out that, before the vendor rescinded the contract, the action for specific performance had, by reason of an order obtained by the purchaser's executor, been dismissed without costs. Counsel for the plaintiff also D argued that Pearlberg had in fact agreed with Scholfield that the contract was at an end, and he relied on the correspondence, to which I have already referred, passing between the solicitors for the respective parties at the time of the notice. I am quite unable to spell out of that correspondence any concluded agreement to put an end to the contract of E Jan. 29, 1932, and to negotiate for a new agreement on the footing that the contract had been validly rescinded. The judge has stated in his judgment that:

> . . . the defendant [Pearlberg] had long since recognised that the position was that the contract had been lawfully rescinded, and that he had instructed a solicitor F to negotiate for a new contract on the basis that the old one had been determined.

If, as I hold, there was no valid rescission of the old agreement, and there was no new agreement entered into, I am unable to see any ground on which Pearlberg can be precluded from enforcing his legal right to have his deposit of £240 returned to him. His legal right is not statute- G barred, and he is entitled to recover that amount. So far as he claims to recover interest in respect of it, the matter is in the discretion of the court, under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3. Having regard to the fact that Pearlberg has delayed bringing his claim until long after the death of both Greaves and Scholfield, and H to his unwarranted delay in bringing his counterclaim to trial, we are of opinion that no interest should be allowed. The order of the judge dismissing the counterclaim must be discharged, and the appeal must be allowed as to the sum of £240, which will be ordered to be paid to Pearlberg. In my judgment, there should be no costs of the counterclaim in the court below, so that, if Pearlberg has paid the plaintiff such costs, there must be an order for repayment of the amount so paid. I can see no ground for depriving Pearlberg of his costs of this appeal, which must be paid to him by the Public Trustee.

A GODDARD, L.J.: It is unnecessary for me to recapitulate the facts, but I will state my reasons shortly for agreeing that this appeal succeeds. The doctrine laid down in *Warde* v. *Dixon* (2) and *Gray* v. *Fowler* (1) not only applies to proceedings in equity but is also a rule of the common law. If one contracting party, either expressly or by conduct, repudiates B a contract, the other can either accept the repudiation, and treat the contract as rescinded, or refuse to do so, and regard the contract as still alive, so that his rights will fall to be determined when the time for performance arrives. He cannot, however, insist on performance and at the same time adopt the remedies open to him on rescission. Applying C that rule to a case where equity would entertain a claim for specific performance, I think that it follows that, if a vendor, by applying for that remedy, asserts that he regards the contract as subsisting, he loses his right to forfeit a deposit, on the footing that the contract has been rescinded by the purchaser's default. However, he may resile from D the position he has thus taken up, and, if he abandons his action by discontinuing it in the manner provided by the rules of court, he can, if the purchaser is still at fault, accept the repudiation and forfeit the deposit. If he so acts, he will have to pay the costs of the proceedings, which have become abortive because he himself has put an end to his cause of action. E The present case forms a good example of the necessity for this rule. When the plaintiff, having given his notice purporting to forfeit the deposit, delivered a completion statement, he claimed that the defendants should pay the costs of the abortive action. I can see no possible ground on which he could base such a claim. If he desired to rescind and forfeit F the deposit, the action was wholly unnecessary, and he could no longer persist in his suit, because, by his own volition, he had extinguished his cause of action. If he did not proceed with the action, the defendant could, no doubt, obtain an order for dismissal for want of prosecution, or, if a statement of claim had been delivered, he could have put in a defence G alleging that the cause of action had been extinguished, and then, if the plaintiff still did not discontinue, I suppose the defendant could set the case down, so as to obtain judgment for his costs. This, I think, shows the anomalous—and, indeed, absurd—position which results from attempting to rescind the contract while the action is still in being.

H Counsel for the plaintiff argued that there was a difference between merely issuing a writ, unaccompanied, or not followed by, a statement of claim. I cannot agree. Under R.S.C., Ord. 1, an action in the Supreme Court is substituted for a proceeding by bill in the High Court of Chancery, and by R.S.C., Ord. 2, an action is commenced by a writ of summons. The procedure in the Palatine Court is, I understand, the same.

There is no magic in the form of the process. What matters is that the proceeding asserts the existence of the contract. I do not stay to consider whether it was open to the plaintiff to expand the relief claimed on the writ by asking in his statement of claim for the alternative relief of rescission, because, in my opinion, one has only to see what was being asserted by the plaintiff when he purported to rescind. The relief claimed by the writ is unambiguous. The plaintiff claims to have the contract specifically performed, or to have damages in lieu of that remedy, which I think means no more than that, if the court considers damages an adequate remedy, he will ask that they be awarded to him.

The judge seems to me to have thought that a vendor can at one and the same time claim the remedy of specific performance, and, while so claiming, enforce the inconsistent right to rescind and retain the deposit. From some passages in the judgment, I think that he may have had in mind the doctrine prevailing between mortgagee and mortgagor—namely, that the former may exercise all his rights at once. No one doubts that a plaintiff in an action for specific performance can claim the alternative remedy of rescission, but that is no more than saying that, if the court, for any reason, thinks that, though the defendant is in default, specific performance cannot be granted, then the plaintiff asks that it may be declared that he can rescind the contract and exercise his rights of forfeiture. No inconsistent position arises, because, if the judgment is for rescission, it follows *ex hypothesi* that the claim for specific performance is thereby ended.

The plaintiff, then, having rescinded the contract when he was not entitled to do so, it follows that there can be no defence to an action by the defendant for a return of the deposit as money had and received. *Laches* forms no bar to a legal claim, and I cannot, on the facts proved, find that the defendant so acquiesced that we ought to infer an agreement by him that the matter should be ended on the terms that the action should be dropped and the deposit taken by the plaintiff instead, and in satisfaction of whatever rights he might have.

Whether or not a plea of estoppel would have succeeded I need not inquire, as it was neither pleaded nor was evidence led on that issue. However, in view of the shifty conduct of the defendant, and his really unpardonable and unexplained delay, especially when it is remembered that he made no claim in the lifetime of the vendor, nor even of the vendor's executor, and the embarrassment which this claim must cause to the present representatives of the vendor's estate and the beneficiaries, I agree that he ought not to have any costs of the action, and, for the same reasons, no interest on the amount he has recovered.

Appeal allowed with costs.

Solicitors: *Linsley-Thomas, Heald & Co.* (for the appellant); *Hewitt, Woollacott & Chown*, agents for *T. H. Scholfield & Co.*, Manchester (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

JOHN JAQUES & SON, LTD. *v.* CHESS (A FIRM).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Clauson, L.JJ.), **February 29, March 1, 19, 1940.]**

Trade Marks and Trade Names—Passing off—"Staunton chessmen"—"Genuine Staunton chessmen"—"Genuine."

The respondents were manufacturers of chess sets of a particular design, with which the name Staunton was associated. The appellant advertised for sale sets of chessmen which he described as "genuine Staunton chessmen." They were made according to the Staunton design, but were not of the respondents' manufacture. The respondents sought to restrain the appellant from offering for sale chessmen not of their manufacture as "genuine Staunton chessmen" or "Staunton chessmen," contending that the name "Staunton," and *a fortiori* the words "genuine Staunton," meant their goods exclusively. The appellant contended that the words meant no more than chessmen of a particular pattern. The judge held that the respondents had not established that in the market as a whole the word "Staunton" denoted their chessmen exclusively, but that, on analogy with *Havana Cigar & Tobacco Factories, Ltd.* v. *Oddenino* (1), the word was to some extent ambiguous, and that, in those circumstances, the use of the word "genuine" when attached to the word "Staunton" must be calculated to lead to the belief that the word was used as referring to the respondents' goods:—

HELD: as the judge had found that the description "Staunton chessmen" was not calculated to deceive, the addition of the word "genuine," since that word imported a reference to correctness of design rather than to commercial origin, could not render those words a description calculated to deceive.

Decision of CROSSMAN, J. ([1939] 3 All E.R. 227) *reversed.*

[EDITORIAL NOTE. In the present case, there was a distinction between the understanding of dealers in the trade of the name "Staunton" and that of the general public interested in chess. It was only dealers in the trade who would in any way associate this name with the plaintiffs' business. This being so, it was argued that the word "genuine" added to the name "Staunton" must form a combination which would be calculated to make the trade, at any rate, believe that the goods so described were products of the plaintiffs' business, but the Court of Appeal, differing from the view taken by the judge of first instance, have found that the addition of the word "genuine" would appear to emphasise the correctness in point of design rather than to indicate that the goods were the product of a particular manufacturer.

AS TO TRADE NAMES OF GOODS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 638-647, paras. 947-956; and FOR CASES, see DIGEST, Vol. 43, pp. 271-279, Nos. 1062-1106.]

Cases referred to:

(1) *Havana Cigar & Tobacco Factories, Ltd.* v. *Oddenino,* [1924] 1 Ch. 179; 43 Digest 279, *1106*; 93 L.J.Ch. 81; 130 L.T. 428; *affg.,* [1923] 2 Ch. 243.

(2) *General Electric Co., Ltd.* v. *Pryce's Stores, British Thomson-Houston Co., Ltd.* v. *Pryce's Stores* (1933), 50 R.P.C. 232; Digest Supp.

(3) *Ford* v. *Foster* (1872), 7 Ch. App. 611; 43 Digest 231, *747*; 41 L.J.Ch. 682; 27 L.T. 219; *revsg. S.C. sub nom. Re "Ford's Eureka Shirt," Ford* v. *Foster,* 20 W.R. 311.

(4) *Cocks* v. *Chandler* (1871), L.R. 11 Eq. 446; 43 Digest 280, *1113*; 40 L.J.Ch. 575; 24 L.T. 347.

APPEAL by the defendant from an order of CROSSMAN, J., dated May 26, 1939, and reported [1939] 3 All E.R. 227. The facts are fully set out in the judgment of the court delivered by Sir Wilfrid Greene, M.R.

J. Silverman for the appellant.

F. E. Bray, K.C., and *James Mould* for the respondents.

Silverman: The appellant is entitled to use the word "genuine" and the judge was wrong in restraining him from doing so. In the circumstances, there was not, and there could not have been, any deception. The market to be considered in this case consists of the chess-playing public, which is the market in which the appellant sells his goods. The basis of the respondents' case was that they objected to the appellant's use of the word "Staunton" as well as to his use of the words "genuine Staunton." They were willing, however, that the appellant should use the words "Staunton pattern," if he so desired. At no stage during the hearing was any distinction made between "Staunton" and "genuine Staunton" by the witnesses on either side. The judge was in error with regard to the market which he had to consider. The market, in the present case, should be confined to chess players. It should not be extended so as to include dealers. *Havana Cigar & Tobacco Factories, Ltd.* v. *Oddenino* (1) and *General Electric Co., Ltd.* v. *Pryce's Stores, British Thomson-Houston Co., Ltd.* v. *Pryce's Stores* (2), show that the court has to consider the market in which the goods are sold, and to consider what the word complained of would mean in that particular market. In the present case, no deception has been proved, and it is perfectly obvious that none could have been proved.

Bray, K.C.: Although the respondents may have made out their case that the word "Staunton" is known to indicate their goods, and that the use of the word by others is deceptive, if the court comes to the conclusion that the possibility of deception is not sufficient to justify an injunction with regard to the use of the word "Staunton" alone, the court would be justified in granting an injunction if the possibility of deception is increased by describing the goods as "genuine Staunton." Whether or not a right has been infringed depends upon the possibility of deception. There is a possible legitimate use of the word "Staunton" by anyone who wishes to describe the pattern or design of his goods. He must not, however, couple with the word anything which increases the possibility of deception. Either the addition of the word "genuine" is meaningless or its use resolves the doubts which people may have had as to the manufacturer of the goods. The doubts may be resolved by the use of the word "genuine" causing people to believe that the goods are of the respondents' manufacture. The respondents are the original manufacturers of Staunton chessmen, and for a long period they had a proprietary right in the name. Although the name is not now exclusively connected with their goods, there is a particular association between the word "Staunton" and the respondents. The word "genuine" is commonly used to indicate that goods are those of the original manufacturer. That conclusion should be drawn, and that is sufficient to justify the granting of an injunction. *Ford* v. *Foster* (3) shows the test as to whether or not a word which was originally a trade mark has become *publici juris.* The test must be whether or not the use of the word by others is calculated to A deceive the public. An original manufacturer of goods is entitled to designate them as "the original": *Cocks* v. *Chandler* (4).

Mould: For a considerable period, the respondents were the only persons who had any reputation in the market in connection with the sale of Staunton sets. After the design registration period had expired, B they could not prevent others from making the design and calling the goods "Staunton pattern sets." The evidence called before CROSSMAN, J., falls into two categories. One class consists of trade witnesses, who are unanimous in saying that to them the word "Staunton" indicates the goods of the respondents, and indicates theirs alone. The C other class of witnesses consists of chess players. They had entered into very few commercial transactions relating to chessmen, and there was no sort of unanimity amongst the players called.

SIR WILFRID GREENE, M.R. [delivering the judgment of the court]: D The respondents, who were plaintiffs in the action, carry on an old-established business of manufacturers of sports and games requisites, including chessmen. They make and sell sets of chessmen of a particular design, with which is associated the name of Staunton, a well-known English chessplayer in the first part of the last century. In their state- E ment of claim, they allege that the description "Staunton" or "genuine Staunton" used in reference to sets of chessmen indicates chessmen of their manufacture exclusively.

The appellant, Baruch Harold Wood, is the proprietor of a periodical called CHESS, in one number of which he advertised for sale sets of chess- F men not of the respondents' manufacture which he described as "genuine Staunton chessmen." The chessmen so advertised were made according to the design referred to above. The respondents alleged that by so describing his chessmen the appellant was passing them off as chessmen of their manufacture, and they claimed the appropriate injunction to G restrain the appellant from offering chessmen not manufactured by the respondents as "genuine Staunton chessmen" or "Staunton chessmen."

At the trial before CROSSMAN, J., the respondents' case broke down on the facts, so far as regards the phrase "Staunton chessmen." Having regard to the widespread use of the word "Staunton" as describing H chessmen of a particular design without reference to any particular commercial source, the judge found as follows, at p. 234:

> In my judgment, the plaintiffs have failed to establish the first thing which they have to establish so far as regards the use of the word "Staunton"—namely, that the word "Staunton" means in the market, when applied to chessmen, chessmen made by the plaintiffs—and, in my judgment, the plaintiffs are not entitled to stop the defendant from using the word "Staunton" alone in connection with chessmen.

This finding was not challenged by the respondents, and, in our opinion, it was manifestly correct.

The legal effect of the judge's finding of fact is in no way altered by the circumstance that, as he finds, at p. 230 :

> . . . some, though not all, of the well-known dealers in games in England, and a very few chess players, regard the word "Staunton," when applied to chessmen, A
> as indicating chessmen manufactured by the plaintiffs, and distinguish chessmen of Staunton design made by persons other than the plaintiffs by calling them Staunton pattern chessmen.

The fact which is frequently found in passing-off actions—namely, that a number of persons, or even a particular class of persons, regards a name or description as indicating the plaintiff's goods—does not of itself lead B
to the result that the plaintiff has a general right to restrain the use of that name or description by others. This does not mean that another trader is entitled to use the name or description in addressing a person or class of persons who to his knowledge will understand it as referring to the plaintiff's goods. In the particular circumstances of such a case, C
user of this kind would in fact be fraudulent. Nothing of the kind has happened or is threatened in the present case, since, in any event, the appellant's advertisements are not addressed to the trade, and the evidence shows that the trade would not be deceived, in view of the terms of the offer taken as a whole. The effect of the decision of the D
judge is that, speaking generally, the use of the name "Staunton" is not deceptive, and that no right of the respondents has been infringed by the appellant's use of it in his advertisement.

The judge, however, went on to find, at p. 235, that :

> . . . the use of the word "genuine," when attached to the word "Staunton," E
> must be calculated to lead to the belief that the term is used to mean "made by Jaques & Son, Ltd.," the plaintiffs.

The passage quoted is prefaced by the words : "In these circumstances, I find that . . ." and, accordingly, for a proper understanding of the judge's reasoning, it is necessary to examine the circumstances which led to this F
conclusion of fact. They are to be found in the immediately preceding paragraph of the judgment, which is as follows, at pp. 234, 235 :

> I think, however, that in the present case I must have regard to the fact that the evidence of the class of dealers differs from the evidence of the class of chess players. Just as in *Havana Cigar & Tobacco Factories, Ltd.* v. *Oddenino* (1) the word "Corona," when applied to cigars, was to some extent ambiguous—sometimes G
> meaning a cigar made by the plaintiffs and sometimes meaning a cigar of a particular shape or size—so in the present case I think that the word "Staunton" as applied to chessmen is to some extent ambiguous. Certainly to a considerable number of traders it means chessmen made by the plaintiffs. To chess players generally, however, it means chessmen of the design known as "Staunton."

The crucial finding here is the finding that the word "Staunton" is H
to some extent ambiguous because to a considerable number of traders it means chessmen made by the plaintiffs. If we rightly understand the two paragraphs in question, the judge means that, whereas those persons who understand the word "Staunton" as being merely descriptive would not attach any distinctive meaning to the added word "genuine."

traders (who *ex hypothesi* already regard the word " Staunton " as distinctive) will be deceived by the phrase " genuine Staunton." That this is what the judge must have meant appears from his reference to *Havana Cigar & Tobacco Factories, Ltd.* v. *Oddenino* (1). In that case, the word " Corona," as applied to cigars, might refer to shape and size or it might refer to a particular brand. To most persons, the latter would be its meaning, and this was the original meaning of the word, which had never been lost. It follows, therefore, that, if a person desiring to purchase a cigar asked for a " Corona " cigar, he would probably expect to receive a cigar of the brand in question, although he might expect to receive a cigar of Corona size and shape of any brand. These facts a vendor of cigars must be taken to know. Accordingly, when in that case the defendant's customer asked for a Corona cigar, the defendant, if he supplied a cigar of Corona size and shape, but not of the Corona brand, would to his knowledge in all probability be deceiving the customer. It was therefore held that the defendant was not entitled to resolve the ambiguity in his own favour, but was bound to make an appropriate inquiry of the customer as to what he meant by the word " Corona."

With all respect to the judge, we are unable to regard *Havana Cigar & Tobacco Factories, Ltd.* v. *Oddenino* (1) as in any respect analogous to the present case. If such an analogy existed, its application would be, not to the phrase " genuine Staunton," but to the word " Staunton " itself, and the result would be that, in response to an order for Staunton chessmen, the appellant would be bound to inquire whether or not the customer required chessmen of the respondents' manufacture. This would be equivalent to saying that, by offering chessmen as Staunton, the appellant would be guilty of passing off, which is the very thing which the judgment negatives. We say that it would be equivalent because in our view, the principle applied in *Havana Cigar & Tobacco Factories, Ltd.* v. *Oddenino* (1) was no different from that which falls to be applied in every other case of passing off. The special form of the injunction was due to the particular way in which orders are given in restaurants, and the injunction might as well have been in a more usual form : *per* SARGANT, L.J., at p. 202. In supplying, without inquiry, a cigar not of the Corona brand in response to a request for a Corona cigar, the defendant was in principle doing precisely the same thing as he would have done had he initiated the conversation by offering a cigar not of Corona brand as a " Corona cigar." In view of the findings of fact in the case, such a spontaneous offer would have infringed the plaintiffs' rights, since the word " Corona " still retained for the majority of persons its original meaning as a brand name, and the probabilities were that the customer would understand the offer to refer to a cigar of the Corona brand. In other words, the injunction granted in *Havana Cigar & Tobacco Factories, Ltd.* v. *Oddenino* (1) would not have been granted if, on the facts of the case, an offer of " Corona cigars " would not have been calculated to deceive. In the present case, the offer of " Staunton chessmen " is not calculated to deceive, as the judge has found, and, accordingly, the analogy breaks down. Even if the reasoning of the judge is assailable, however, his judgment could be supported if he had found as a fact, or if this court were to find as a fact, on the evidence, that, whereas the word " Staunton " must be taken as *publici juris*, the addition to it of the word " genuine " confines its reference to the A respondents' goods—not necessarily to the mind of everyone, but to the minds of such a high proportion of those concerned as to make it possible to say as a general proposition that the phrase " genuine Staunton " is calculated to deceive, although the word " Staunton " is not. There is, however, no such finding by the judge. Moreover, an B obvious difficulty arises at the outset. If the respondents are unable to contend that the word " Staunton " by itself indicates commercial origin, having regard to the widespread use of the word as referring solely to design, it is *prima facie* difficult to see how the addition of the word " genuine " can import a reference to a particular manufacturer. C Rather it would appear to emphasise the correctness in point of design of the chessmen so described. Nevertheless, this difficulty could be surmounted if the evidence were sufficient to show that the addition of the word " genuine " did import a reference to the respondents' manufacture. D

It was argued before us that the evidence is sufficient to establish this proposition. By way of background to the argument, it was contended that, as a matter of history, the word " Staunton " originally denoted the respondents' manufacture exclusively, that in course of time it had (unlike the word " Corona " in *Havana Cigar & Tobacco Factories, Ltd.* v. *Oddenino* (1)), lost its meaning as a brand name, but that the E fact that a monopoly had originally belonged to the respondents meant that a very slight addition to the word, such as the addition of the word " genuine," would refer back to that original monopoly. With regard to this contention, it is enough to say that the evidence to which we were F referred is, in our opinion, insufficient to establish the existence of any such monopoly in former times, and, even if it had been sufficient, the argument would have had little weight.

It is necessary to refer shortly to the evidence on which the main argument was based. The respondents came into court to support G what was their main case—namely, that the use of the word " Staunton " was by itself calculated to deceive. It was to this proposition that the evidence which they called was directed. They were not setting up what would in truth have been an alternative case—namely, that, if the use of the word " Staunton " was not by itself calculated to deceive, the use H of the expression " genuine Staunton " was. To support such an alternative case, the proper evidence would have been that of witnesses who did not regard the word " Staunton " as referring to the respondents, but did regard the expression " genuine Staunton " as so referring. No such evidence was called on behalf of the respondents, for the simple reason that their witnesses were there to support the proposition that the word "Staunton" by itself referred to the respondents. It would obviously have been useless to ask such witnesses what the expression "genuine Staunton" would have conveyed to them if, contrary to their own evidence, the word "Staunton" did not refer to the respondents Speaking generally, the evidence of the respondents' witnesses leaves on our minds the clear impression that they regarded the expression "genuine Staunton" as referring to the respondents because they regarded the word "Staunton" by itself as doing so, and not because the word "genuine" imported some reference to the respondents which was not to be found in the word "Staunton" alone. We therefore refrain from a detailed examination of the evidence given by the respondents' witnesses.

Reliance was also placed upon passages in the evidence of certain of the appellant's witnesses. To build up a case which was not supported by the plaintiffs' own witnesses—and, indeed, was not put to them in examination-in-chief—by searching the evidence of the defendant's witnesses is no easy task, and the court will not readily conclude that it has been successfully achieved. In the present case, we are quite unable to find in these passages anything which would justify us in coming to the conclusion that, in describing his chessmen as "genuine Staunton," the appellant was representing them as the goods of the respondents. In the result, the appeal is allowed, and the action is dismissed. The respondents must pay the costs here and below.

Appeal allowed with costs in both courts.

Solicitors: *Sparks, Russell, Isard & Co.*, agents for *W. Ritson Morry*, Sutton Coldfield (for the appellant); *Radford, Frankland & Mercer* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re ROYCE, TURNER *v.* WORMALD AND OTHERS.

[CHANCERY DIVISION (Simonds, J.), **March 15, 18, 19, 1940.**]

Charities—Charitable purposes—Religious purposes—"For the benefit of the choir"—Gift of part of residue—General charitable intent—Scheme.

The testator by his will gave a legacy of £1,000 to the vicar and churchwardens of a church "for the benefit of the choir." He also gave a one-fifth share of his residuary estate for the same purpose, the remaining shares of the residuary estate being given to various charities:—

HELD: (i) the words "for the benefit of the choir" did not intend the personal benefit of a body of persons, but intended a gift for the maintenance and improvement of the musical services of the church, particularly by means of a choir.

(ii) the gifts were valid charitable gifts, as being for the advancement of religion through musical services.

(iii) there was a general charitable intent, and, as there would probably be a greater sum available than was required for the maintenance of the particular choir, a direction was made for a scheme to be settled for the establishment of the charity for the advancement of religion through musical services.

[**EDITORIAL NOTE.** It would appear that there is a decision of LORD HARDWICKE, L.C., that a gift for a choir is not a good charitable gift, but this appears to be based upon reasoning which cannot now be supported. A

AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160; and FOR CASES, see DIGEST, Vol. 8, p. 249, Nos. 83-86.]

Cases referred to:

(1) *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534; 8 Digest 246, *62*.

(2) *A.-G.* v. *Oakaver* (1736), cited in 1 Ves. Sen. 536; 8 Digest 249, *83*.

(3) *Turner* v. *Ogden* (1787), 1 Cox, Eq. Cas. 316; 8 Digest 249, *93*; *subsequent proceedings* (1794), cited in 3 Ves. 333. B

(4) *Re Hendry, Watson* v. *Blakeney* (1887), 56 L.T. 908; 8 Digest 286, *619*.

(5) *Re Wilson, Twentyman* v. *Simpson*, [1913] 1 Ch. 314; 8 Digest 313, *948*; 82 L.J.Ch. 161; 108 L.T. 321.

(6) *Re Monk, Giffen* v. *Wedd*, [1927] 2 Ch. 197; Digest Supp.; 96 L.J.Ch. 296; 137 L.T. 4. C

(7) *Hutchins* v. *Denziloe & Loveland* (1792), 1 Hag. Con. 170; 19 Digest 287, *773*.

(8) *Re Palatine Estate Charity* (1888), 39 Ch.D. 54; 19 Digest 459, *3064*; 57 L.J.Ch. 751; 58 L.T. 925.

(9) *Wyndham* v. *Cole* (1875), 1 P.D. 130; 19 Digest 302, *1005*.

(10) *Re King, Kerr* v. *Bradley*, [1923] 1 Ch. 243; Digest Supp.; 92 L.J.Ch. 292; 128 L.T. 790. D

(11) *Re Robertson, Colin* v. *Chamberlin*, [1930] 2 Ch. 71; Digest Supp.; 99 L.J.Ch. 284; 143 L.T. 36.

ADJOURNED SUMMONS to determine whether certain gifts in the will of a testator are good and valid charitable gifts for the maintenance of E the musical services in a certain church. The facts are fully set out in the judgment.

C. D. Myles for the plaintiff.

A. Andrewes Uthwatt for the Attorney-General.

H. B. Vaisey, K.C., and *H. E. Salt* for the vicar and churchwardens. F

R. F. Roxburgh, K.C., and *R. W. Goff* for the next of kin.

Humphrey-King for the choristers.

Uthwatt: This is a perpetual gift, and means that the income is to be applied to the improvement of the musical services of the church. It is an out-and-out gift to the vicar and churchwardens. The G only ground for supporting the gift is that it is a gift for the advancement of religion. [Counsel referred to *Re Monk, Giffen* v. *Wedd* (6), *Re King, Kerr* v. *Bradley* (10) and *Re Robertson, Colin* v. *Chamberlin* (11).]

Roxburgh, K.C.: The words here are too wide, because the gift is not for the vicar or churchwardens, but for the benefit of the choir, the H word "benefit" necessarily importing a discretion larger than the ambit of charitable purposes. In *Re Hendry, Watson* v. *Blakeney* (4), the "choir fund" is something a good deal narrower than "for the benefit of the choir." The real question is whether the reasoning in the case of *Hutchins* v. *Denziloe & Loveland* (7) applies. This is the only case which goes into the question of music in churches. If this gift enables the vicar to hold musical festivals and the singing of Latin anthems, then that would not be in accordance with ecclesiastical law. However, we must consider that which is charitable, and not that which is unlawful: *Turner* v. *Ogden* (3). This gift fails, both on the ground of illegality and on that of uncertainty, for, if the intention was that the fund should be set aside, and the income should be used, then it is a perpetuity, and fails, unless it is a charity. The purposes are not necessarily charitable.

Goff: The principle is not whether the testator intended to promote the charitable object in some sort of way, nor is it whether the gift will in fact promote the charitable object. The question is whether or not, as a matter of construction, the words used confine the discretion of the trustees with charitable objects. When one looks at the words, one finds that they are not words which confine the trustees to charitable objects. The gift is not for the advancement of charitable uses. It is a gift for the benefit of the choir. If there is one way of benefiting the choir which is not charitable, the gift transgresses the rule.

Vaisey, K.C.: The function of the modern choir, as opposed to that of the pre-Reformation choir, is confined to the religious service. The "clerks" referred to in the burial service mean the choristers to-day. The words "say" or "sing altogether" can only mean, or refer to, a choir. [Counsel referred to *Re Palatine Estate Charity* (8) and *Wyndham* v. *Cole* (9).]

Roxburgh, K.C., in reply: If this testator had intended to give these gifts for general charitable purposes, nothing would have been simpler than to give the money to the vicar and churchwardens. The fact that he mentioned a particular purpose means that he intended that purpose and no other. There is here no context to throw any light on the question of another purpose.

SIMONDS, J.: In this case, the testator, David Needham Royce, died on Dec. 26, 1938, leaving a large fortune. He was, I believe, himself of an advanced age. He made his will on Sept. 30, 1938, and the question which I have to determine arises upon a pecuniary bequest and a bequest of a share of his residuary estate. The pecuniary bequest, which was one of a large number of legacies to friends and for various charitable purposes and to charitable institutes, was in these terms:

> To the vicar and churchwardens of Oakham Church for the benefit of the choir the sum of £1,000.

Then the residuary bequest was in these terms. He gave and devised his real estate and the residue of his personal estate to his trustees upon trust for sale, and directed them:

> . . . to stand possessed of the residue in trust as to two-fifths thereof for the beforementioned Royce Institute Southgate Leicester absolutely as to a further one-fifth thereof for the vicar and churchwardens of Oakham Church aforesaid for the purposes declared concerning the legacy given to them as aforesaid [the legacy

> of £1,000 just stated] as to a further one-fifth for the Leicester Royal Infirmary and as to the remaining one-fifth for the Rutland Memorial Hospital.

The question which I have to determine is as to the meaning and validity of the gift :

> To the vicar and churchwardens of Oakham Church for the benefit of the choir. . . .

The first thing I have to determine is what those words "for the benefit of the choir" mean. They are, perhaps, susceptible of several meanings. "The choir" may mean a certain part of the fabric of the church. I only mention that in order to dismiss it. It is clear that this is not a gift for the benefit of the fabric, or of any part of the fabric, of the church. Next, it may mean a gift for the benefit of the persons who, at the date of the testator's will, or his death, were the persons who formed the choir of Oakham Church. That is a possible meaning, and a member of the choir at that date has been added as a respondent to these proceedings for the purpose of arguing that that view is the right one. It is right that I should say at this point that counsel for the choristers, whose duty it was to argue that point, was under a duty to argue it inasmuch as his client was a representative, and a representative of a number of persons, some of whom were infants, and could not, therefore, give up any benefit to which they were justly entitled. He has, therefore, argued on their behalf that it is a gift for the benefit of members of the choir. That is a meaning which I must not take. It is quite clear, in my view, that this gift is not intended to be personal to the particular members of the choir, but rather has the impersonal meaning, which I may state. That is surely this. Where a testator gives a sum (and in this case a very substantial sum—not only a £1,000 pecuniary legacy, but also a share of the residuary estate, which may amount to as much as £12,000), he does not intend the personal benefit of a body of persons, but he intends an impersonal gift—namely, a gift for the advancement and improvement of the musical services in the church by means of a choir. That, I think, is the natural meaning which I should attribute to a gift of this kind, where the testator gives the money to the vicar and churchwardens for the benefit of the choir. That is a loose expression, but the testator is looking to the improvement of that part of the church service which consists of music, and, in particular, of the choir. Therefore, I find as a matter of construction that this is a gift for the maintenance and improvement of musical services in the church of Oakham, particularly by means of a choir.

That being what the gift is, the next question arises as to its validity. I am bound to say that I should have had no doubt whatever as to its validity. I was, however, faced with a decision given nearly 200 years ago by LORD HARDWICKE, L.C., in *A.-G.* v. *Whorwood* (1). This passage appears, not, indeed, as part of the judgment in that case, but as part of the argument and the interlocutory observation of LORD HARDWICKE, L.C., at p. 536 :

> In *A.-G.* v. *Oakaver* (2), Feb., 1736, the Master of the Rolls established [that is,

> held valid] a stipend given to keep up an organ and for the organist: but as to £40 per annum to the choristers he refused it: on appeal your Lordship affirmed the decree; as the choristers never were allowed in parochial churches.
>
> LORD HARDWICKE, L.C., said, what he went on was, that it was contrary to the constitution of the Church of England to have them in parochial churches and that they would be under no rule of government as they are in other churches; and the law would not allow they should be under the government of the heir at law—

A Then the observation closes with a dash. What his Lordship meant to add, nobody will ever know. Therefore, I have the statement of LORD HARDWICKE, L.C., (if it is accurately reported) that, at least in 1736, it was contrary to the constitution of the Church of England to have them —that is to say, choristers—in parochial churches. It has been suggested B that that is an authority binding on me to-day which precludes me from holding that a gift for the improvement of musical services in a church through a choir is a valid gift. Upon that decision of LORD HARDWICKE, L.C., there appears to have been remarkably little comment. I find, however, this reference to the authority in TYSSEN'S LAW OF C CHARITABLE BEQUESTS, 2nd Edn., p. 84. After referring at p. 84, to *A.-G.* v. *Whorwood* (1), the editor goes on as follows, at p. 85:

> It may be doubted, however, whether a bequest for choristers in a parish church would now be held void as being illegal. In *Turner* v. *Ogden* (3), a very similar gift was considered to be charitable; and in *Re Hendry, Watson* v. *Blakeney* (4) . . . NORTH, J., seems to have considered a choir fund to be a charitable object.

D I think I am right in saying that in neither of those cases was the attention of the court called to the decision of LORD HARDWICKE, L.C. However that may be, it seems to me quite clear that in 1940, when one considers the constitution of the Church of England and its practice over these many centuries, it is quite impossible to hold that there is any E illegality in having in a parochial church choristers or a choir, and in having musical services conducted with their aid. What, perhaps, LORD HARDWICKE, L.C., had in mind when he said that it was contrary to the constitution of the Church of England to have choristers in a parochial church was no more than that, in contradistinction to a F cathedral or collegiate church, of which the choristers might still remain part of the body, in parochial churches undoubtedly after the Reformation the choristers were not recognised as part of the church body. However, the proposition that then, or at any time, it was illegal to have a choir, appears to me to be a proposition for which there is no authority.

G Counsel at the bar, who are learned in these matters, have not been able to suggest that it is now, or, I may say, in these many centuries past it has ever been, suggested that there was any illegality in having in a parish church a choir or choristers to assist in the religious services there carried on. Accordingly, it seems to me impossible now to say that there H is any illegality in this gift, which is intended by means of a choir to maintain and improve the religious services of the church. If that is so, that is the end of the matter. Here I have a valid gift, which has to be devoted to that particular charitable purpose. That it is charitable is beyond question, for it is a gift for the advancement of religion by a particular mode.

That brings me, then, to the last question. It has been suggested that, if the fund is to be devoted only to those purposes which fall strictly within the terms of the gift as I have construed it, then there may be an excess left over, and it is argued that that excess must go to the next-of-kin, upon the footing that here there is no general charitable intent, but only a particular charitable intent, and, if there is a particular charitable intent which is satisfied before the fund is exhausted, then the balance must go to the next-of-kin. That involves the consideration of whether there is here a general charitable intent or only a particular charitable intent. That is a very artificial distinction.

In *Re Wilson, Twentyman* v. *Simpson* (5), Parker, J., after a consideration of the cases, divides it in this way, at pp. 320, 321:

> First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect . . . Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument.

In this case, therefore, I have to construe this instrument to see within which class of cases it falls.

One must observe this, in the first place. Here I need only deal with a share of residue. There is no question about the legacy of £1,000 being applied for the particular charitable purpose *modo et forma*. I deal, therefore, with the residue, and I find that the testator has given a share of residue. He did not know, and could not know, within precise limits to what that share of residue would amount. He must be taken, therefore, as having given a sum unqualified for the purpose of the benefit of the choir. That leads one to the suspicion that he must have had in mind the possibility of a particular mode of charity being exhausted before that share of residue was exhausted.

Next, it is to be observed that this is a perpetual gift given out-and-out to the vicar and churchwardens, and in more than one case it has been held that a gift out-and-out to the vicar and churchwardens, or to any body of trustees who form the estate, is an indication that the testator intended that the whole of the fund was to be employed, if not in a particular mode, then according to a general intent.

Next—and I think this is the consideration which appeals most to me—a gift simply for the musical services in a church is not charitable unless one considers its underlying intent. The charitable intention—and I use the word "charitable" in its legal sense—in giving money for the purpose of giving musical services in a church is for the advancement of religion, and it is only the particular mode of carrying out that intent which is indicated when the testator directs that the money is to be applied in the promotion of musical services. I find here, therefore, in the very language of the testator, his real intent—namely, the advancement of religion through musical services—and, if that is the real meaning of his words, then I have a general charitable intent to which effect can, A and ought to, be given, if the fund is more than sufficient for carrying out that general charitable intent by a particular mode.

Lastly—and this is again, within my recollection, a matter which has influenced the court in determining into which of the two categories of cases a particular gift falls—here I find the gift of residue one of several B gifts, all charitable, to which the testator has devoted his residuary estate, and that, I think, is a factor which has more than once been taken into account in determining whether or not there is a general charitable intent.

Accordingly, upon all those grounds—to which perhaps I should add C the authority of *Re Monk, Giffen* v. *Wedd* (6), the last case, I think, on this branch of the law, which came before the Court of Appeal—I must come to the conclusion here that there is a general charitable purpose. Accordingly, I must direct a scheme to be settled for the establishment of the charity constituted by these two gifts, the pecuniary D legacy and the gift of the share of residue.

Solicitors: *Peacock & Goddard* (for the plaintiff and the vicar and churchwardens); *Treasury Solicitor* (for the Attorney-General); *Field, Roscoe & Co.* (for the next of kin); *Horne & Birkett* (for the choristers).

E [*Reported by* CHARLES NEWTON, ESQ., *Barrister-at-Law.*]

Re CUTCLIFFE'S WILL TRUSTS, BREWER *v.* CUTCLIFFE.

F [CHANCERY DIVISION (Morton, J.), **February 29, March 13, 1940.]**

Conflict of Laws—Intestate succession—Succession to proceeds of sale of settled land—Whether movables or immovables—Settled Land Act, 1925 (*c.* 18), *s.* 75 (5).

The deceased died in 1897 domiciled in Ontario. At the date of his G death he was entitled under a settlement to an interest in remainder expectant on the death of the survivor of three persons, and later that interest fell into possession. The settled property consisted of (*a*) certain lands in England and (*b*) stock of English companies bought with the proceeds of sale of land subject to the settlement. The land and stock were at all times vested in trustees resident in England and the settlement was created by the will of an English testatrix. The summons asked H whether the heir-at-law or the next of kin of the deceased was entitled to the land and stock:—

HELD: (i) the question whether settled property was a movable or an immovable was to be determined by the *lex situs*, i.e., by English law.

(ii) the stock representing the proceeds of sale of settled land was by English law an immovable and devolved as such.

(iii) both the land and the stock passed to the heir-at-law of the deceased.

[**EDITORIAL NOTE.** The main point of this decision—namely, whether the stock was to be treated as realty or personalty—is for practical purposes decided in *Re Cartwright* (3), but the matter here arises in rather different circumstances. The previous case arose in considering whether such property was personalty within the meaning of the Wills Act, 1861, but there now seems to be no reason to suppose that the proceeds of sale of settled land, whether they be money or investments, are to be treated as realty. A

AS TO INTESTATE SUCCESSION, see HALSBURY, Hailsham Edn., Vol. 6, pp. 245, 246, para. 299; and FOR CASES, see DIGEST, Vol. 11, pp. 367-369, Nos. 468-491.]

Cases referred to:

(1) *Re Berchtold, Berchtold* v. *Capron*, [1923] 1 Ch. 192; Digest Supp.; 92 L.J.Ch. 185; 128 L.T. 591.

(2) *Re Hoyles, Row* v. *Jagg*, [1911] 1 Ch. 179; 11 Digest 340, *290*; 80 L.J.Ch. 274; B 103 L.T. 817.

(3) *Re Cartwright, Cartwright* v. *Smith*, [1939] Ch. 90; [1938] 4 All E.R. 209; Digest Supp.; 108 L.J.Ch. 51; *revsg.*, [1938] 3 All E.R. 391.

ORIGINATING SUMMONS to determine whether under the intestacy of the heir-at-law of a certain testatrix, certain property devolved in C accordance with the law of England or in accordance with the law of his domicil. The facts are fully set out in the judgment.

G. A. Rink for the plaintiff.

J. F. Bowyer for the first defendant, the eldest son and heir-at-law of the heir-at-law of the testatrix. D

W. G. H. Cook for the second defendant, one of the children of the heir-at-law of the testatrix.

MORTON, J.: Sophia Ilbert Cutcliffe, of Barnstaple, Devon, whom I shall call the testatrix, died on Oct. 24, 1884. Her heir-at-law was E her nephew, John Charles Cutcliffe. He died on Apr. 11, 1897, intestate and domiciled in the province of Ontario in the dominion of Canada. His wife predeceased him. According to English law, his heir-at-law was his eldest son, the first defendant, Ashton Bluett Cutcliffe, and his next-of-kin were his 7 children, who survived him, of whom the second F defendant, De Courcy Bluett Cutcliffe, is one. Under the law of the province of Ontario, the real and personal estate of a man dying on Apr. 11, 1897, intestate and domiciled in that province, leaving surviving him children but no wife, and no descendants of children who had died in his lifetime, would have been distributable equally among such G surviving children.

The question which I have to determine is whether, under the intestacy of J. C. Cutcliffe, certain property devolved in accordance with the law of England or in accordance with the law of his domicil. The events giving rise to the question are as follows. By her will, dated Sept. 20, H 1879, the testatrix devised her real estate, all of which was in England, to the trustees of her will upon certain trusts, which I need not state in detail. In the events which happened, she effectively and completely disposed of two-fifths of her real estate. John C. Cutcliffe took the income of these two-fifths during his life, and on his death the capital passed to his children. The testatrix also effectively disposed of the income of the remaining three-fifths thereof, until the death of the survivor of J. C. Cutcliffe's three sisters, her nieces, upon trusts in favour of those nieces. No one of the nieces ever had any children. The survivor of the three nieces was Isabel Prestwood Watts, and she died on Dec. 20, 1916. At the date of her death, she was receiving the income of three-fifths of the testatrix's real estate under the trusts of the will. The will contained the following proviso:

> Provided always that if any of them my said nephew and nieces shall die without leaving issue who being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry then I direct that the shares or share to the income of which such nephew or niece is entitled for life under the trusts hereinbefore declared shall be held in trust for the issue of the others or other of them my said nephew and nieces who shall die leaving issue in equal shares *per stirpes* such interest to be vested in males on attaining the age of 21 years and in females on attaining that age or on marriage.

The testatrix gave her residuary personal estate to her trustees upon certain trusts for sale, for payment of her debts and funeral and testamentary expenses and the legacies bequeathed by her will, and upon trust to invest the surplus of the proceeds of sale as therein mentioned. She directed her trustees to hold such investments, and the interest, dividends and income arising therefrom:

> . . . upon such and the like trusts in all respects whatsoever as are hereinbefore declared and contained of and concerning my said real estate and the income thereof respectively.

On July 1, 1936, Crossman, J., made an order the material part of which is as follows:

> This court doth declare that on the true construction of the will of the abovenamed testatrix Sophia Ilbert Cutcliffe and in the event that happened of the late plaintiffs Ilbert Mary Cutcliffe Ida Elizabeth Cutcliffe and Isabel Prestwood Watts dying without issue the shares of the testatrix's residuary personal estate to the income of which they had respectively been entitled for life under the trusts of the testatrix's will were undisposed of by that will as from the death of the late plaintiff Isabel Prestwood Watts.

This being the result of the proviso which I have quoted, as regards three-fifths of the testatrix's residuary personal estate, it was conceded in the argument before me that three-fifths of the testatrix's real estate was also undisposed of as from the death of Isabel Prestwood Watts.

In these circumstances, it seems clear that, on the death of the testatrix in 1884, her heir-at-law, J. C. Cutcliffe, became entitled to three-fifths of her real estate in remainder, expectant on the decease of the survivor of the three nieces named in the will. His interest in remainder was liable to be defeated wholly or partially if all or some one or more of his sisters had children, but this event did not happen. It would seem equally clear, but for the events which I am about to mention, that, on the death of J. C. Cutcliffe intestate, his interest in this real estate, being an interest in immovables situate in England, would devolve upon his eldest son and heir-at-law, the first defendant. However, during the period between the death of the testatrix in 1884 and the death of

J. C. Cutcliffe in 1897, certain parts of the real estate devised by the will of the testatrix were sold under the provisions of the Settled Land Acts. The proceeds of such sales were paid to two persons resident in England, who, by an order of Dec. 4, 1886, had been appointed trustees for the purposes of the Settled Land Act, 1882, of the settlement made by the will of the testatrix. The trustees invested part of the proceeds of sale in the purchase of other lands and the remainder in the purchase of £1,962 Caledonian Railway 4 per cent. debenture stock, which is now represented by £1,962 London, Midland & Scottish Railway 4 per cent. debenture stock.

Thus, in the events which happened, when J. C. Cutcliffe died in 1897, he was entitled to a vested interest (liable to be divested in certain events) in remainder, expectant on the death of the survivor of his three sisters, in (*a*) certain lands in England settled by the will of his aunt, and (*b*) a sum of Caledonian Railway debenture stock, representing the proceeds of sale of other lands subject to the same settlement. It is admitted that the interest of J. C. Cutcliffe in the lands above-mentioned was an interest in immovables, and passed on his death to the first defendant or his heir, according to English law, but it is argued that his interest in the debenture stock was an interest in a movable, and passed, under the law of Ontario, to all his children living at his death in equal shares.

I have to decide whether in 1897 this debenture stock was a movable or an immovable. If it was a movable, the devolution of J. C. Cutcliffe's interest therein would be governed by the law of Ontario. If it was an immovable, the devolution of J. C. Cutcliffe's interest therein would be governed by the law of England. This question is still of some importance, since the provisions of the Settled Land Act, 1882, s. 22 (5), to which I shall shortly refer, are reproduced, in substance, in the Settled Land Act, 1925, s. 75 (5). I start with the rule, which is, I think, well-established, that the question whether particular property is a movable or an immovable is decided according to the *lex situs*: see, for example, *Re Berchtold, Berchtold* v. *Capron* (1), at p. 199. It seems to me clear that this investment, being debenture stock of a British company, and being capital moneys held by the trustees, resident in England, of a settlement of land in England made by the will of an English testatrix, must be regarded as being situate in England for the purposes of the rule stated above.

Was this stock in 1897 a movable or an immovable, according to the law of England? In my view, it was an immovable. The Settled Land Act, 1882, s. 22 (5), provides as follows:

> Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

The important words are: "shall, for all purposes of . . . devolution, be considered as land." The question which I am considering is a question as to the devolution of this stock under the intestacy of J. C. Cutcliffe and, in my judgment, this section tells me that for this purpose I must treat the stock as being an immovable.

A Considering the matter without reference to any previous decisions, I should arrive at the conclusion that J. C. Cutcliffe's interest in this stock passed on his death to his heir-at-law, the first defendant. It is suggested by counsel for the second defendant, however, that such a conclusion would conflict with certain observations of RUSSELL, J., in *Re Berchtold,*
B *Berchtold* v. *Capron* (1). The decision in that case is accurately summarised in the headnote, which is as follows:

> When a person domiciled in a foreign country dies intestate leaving an interest in the proceeds of sale of English freeholds which are subject to a trust for sale but not yet sold, such an interest is an immovable, and the succession thereto is governed by the *lex situs.*

C

Thus it is clear that the question which RUSSELL, J., had to decide was not the same as that which I have to decide. However, counsel for the second defendant relies on the following passage from the judgment of RUSSELL, J., at pp. 205, 206:

> D On behalf of the Countess Szokolyi it was argued that according to English law land directed to be sold and turned into money must be considered to be money; and that on the principle that equity considers done what should be done, the Birmingham freeholds are, in the eye of the law, money. This argument, to be effective, must add the words "for all purposes." That the Birmingham freeholds are to be treated as money for some purposes, no one doubts. Thus the interest of the taker is personal estate. But this equitable doctrine of conversion only arises and comes into play where the question for consideration arises as
> E between real estate and personal estate. It has no relation to the question whether property is movable or immovable. The doctrine of conversion is that real estate is treated as personal estate, or personal estate is treated as real estate; not that immovables are turned into movables, or movables into immovables. As FARWELL, L.J., pointed out in *Re Hoyles, Row* v. *Jagg* (2), the fact that a mortgage is regarded as personal estate for certain purposes in questions between our fellow-subjects here has no bearing on the question whether such a mortgage should be
> F regarded as a movable or not in questions of international law.

It is clear from this passage that, in the view of RUSSELL, J., the equitable doctrine of conversion did not operate to transform land held upon trust for sale into a movable, so as to make it devolve according to the *lex domicilii.*

G In the present case, however, I find that there is a statutory provision which says that the stock in question shall, for all purposes of devolution, be considered as land. In my view, that provision has the effect that, in deciding whether the law of England or the law of Ontario governs the devolution of J. C. Cutcliffe's interest in this stock, I must consider that
H this stock is land. I do not know what decision RUSSELL, J., would have given in *Re Berchtold, Berchtold* v. *Capron* (1) if there had been in existence in 1923 a statute which provided that "land held upon trust for sale, while remaining unsold, shall for all purposes of disposition, transmission, and devolution, be considered as money." There was not in 1923, and there is not to-day, any such statute. RUSSELL, J.,

was considering only whether or not the equitable doctrine of conversion transformed land into a "movable." This being so, I do not think that his decision, or his reasons for that decision, compel me to treat the stock in question as a movable, and to hold that its devolution is governed by the law of Ontario. In my view, having regard to the rule which I have stated above, and to the provisions of the Settled Land Act, 1882, s. 22 (5), I ought to regard this stock as an immovable, and to hold that the devolution of J. C. Cutcliffe's interest in this stock was governed by the law of England. If this is so, his interest passed to the first defendant as his heir-at-law. I am supported in this view by certain observations of Sir Wilfrid Greene, M.R., in *Re Cartwright, Cartwright* v. *Smith* (3), at p. 104 ([1938] 4 All E.R., at p. 215):

> The next argument is the one which came first in order of time, that the Settled Land Act, 1925, s. 75 (5), only effects conversion for the purposes of disposition, transmission and devolution under the settlement itself, and does not operate to affect the nature of capital money and its disposition, transmission and devolution for any purpose outside the settlement. I have some difficulty in following the logic of that argument in the circumstances of this case. At the date when the settlor died there was in existence property which for the purposes of this argument is to be assumed to have been at that moment in the eye of the law real estate. The question is: Is that property personal estate for the purpose of Lord Kingsdown's Act? If in the eye of the law it was at that moment real estate, the answer is in the negative. I cannot see how there is any room for a suggestion that in some way or another what we are dealing with here is something outside the four corners of the settlement altogether. If you have something which had got out of the settlement, so to speak, there is nothing left for subsect. (5) to operate upon, but when you look at the critical moment, namely, the moment of death, and ascertain what was the nature of the property at that moment, it seems to me that the answer is quite clear.

These observations were based on the Settled Land Act, 1925, s. 75 (5), which reproduces the Settled Land Act, 1882, s. 22 (5), with certain variations which seem to me immaterial for the present purpose.

Counsel for the second defendant put forward the alternative argument that there had been some election by J. C. Cutcliffe during his lifetime which operated to make his interest in this stock devolve on his death as personalty. In my judgment, this argument is wholly without foundation. In the first place, J. C. Cutcliffe was not, at any time during his life, in a position which entitled him to make any such election. In the second place, if I assume that he could have so elected, there is not a shred of evidence that he did so elect. The cases referred to by counsel in support of this argument were decisions on facts which differ widely from those in the present case. In my view, they afford no support to the argument put forward in the present case, and it is unnecessary to examine them in detail. For these reasons, I decide that, on the death of J. C. Cutcliffe, his heir-at-law, the first defendant, became entitled to the interest of J. C. Cutcliffe in three-fifths of the debenture stock in question. That interest became an interest in possession on the death of Isabel Prestwood Watts on Dec. 20, 1916.

Solicitors: *Vandercom, Stanton & Co.* (for all parties).

[*Reported by* Charles Newton, Esq., *Barrister-at-Law.*]

Re JUDGMENT DEBTOR (No. 266 OF 1940), JUDGMENT CREDITORS *v.* JUDGMENT DEBTOR.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Luxmoore, L.JJ.), **April 5, 1940.**]

Emergency Legislation—Leave to enforce judgment—Execution suspended provided £10 *paid on Feb.* 1, 1940, *and* £10 *per month thereafter—"Thereafter."*

An order under the Courts (Emergency Powers) Act, 1939, s. 1, gave the judgment creditor leave to enforce the judgment, but provided for a stay of execution if the debtor paid £10 "on Feb. 1, 1940, and £10 per month thereafter." £10 was paid on Feb. 1, but the next payment of £10 was not made until Mar. 5. On Mar. 2, the judgment creditor issued a bankruptcy notice, contending that the latest date for the second payment was Mar. 1. The debtor contended that he had the whole of the month of March in which to make that payment:—

HELD: upon the proper construction of the notice, the word "thereafter" referred to the date on which the first payment was to be made—namely, Feb. 1—and the last day for payment of the second instalment was accordingly one calendar month after that date, that is, Mar. 1.

[**EDITORIAL NOTE.** The matter decided here is purely one of the construction of the order, but the order is in a common form, and the decision of the Court of Appeal upon its proper interpretation will be of considerable importance. If the right of creditors to enforce their remedies is to be postponed, it is essential that the extent of the postponement be precisely defined.

AS TO STAY OF EXECUTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

Case referred to:

(1) *Brown* v. *Black*, [1912] 1 K.B. 316; 42 Digest 145, *1436*; 81 L.J.K.B. 458; 105 L.T. 982.

APPEAL by the judgment creditors from a decision of Mr. Registrar PARTON setting aside a bankruptcy notice. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

R. F. Levy, K.C., and *Cyril Salmon* for the appellants.

Alban Gordon and *Sebag Shaw* for the respondent.

Levy, K.C.: The sympathies of the registrar seem to have been aroused on behalf of the debtor. The registrar took the view that the second instalment was not due until the end of March. He had no power to set aside the bankruptcy notice as being irregular. The motion was to set aside the bankruptcy notice. The debtor would have had to show that it was irregular in order to succeed on the motion. The appellants obtained judgment against the debtor, and proceedings were taken to enforce the judgment under the Courts (Emergency Powers) Act, 1939. An order was made, and the first instalment under that order was made payable on Feb. 1, 1940. The second instalment was not paid until Mar. 5, 1940. The bankruptcy notice was issued on Mar. 2. The registrar came to the conclusion that the debtor had the whole of March in which to pay the second instalment. He said that the whole of March was the following month. [Counsel referred to *Brown* v. *Black* (1).]

Shaw : The word " month " means a calendar month. When making the order, the master may have been intending to give a special indulgence to the debtor by giving him an opportunity of paying at the end of March. If the first payment had had to be made on Feb. 5, 1940, the position would have been the same, and the second payment would have had to be made during and in the course of March. The order says " per month." In LEWIS & SHORT'S LATIN DICTIONARY, the word " per," in reference to time, is stated to mean " through, throughout, during, for, in the course of." The words " per month " must mean in each month thereafter, beginning on the first day and ending on the last day of each month. If the language is ambiguous, it ought to be construed in the way which is favourable to the debtor.

SIR WILFRID GREENE, M.R. : This appeal raises a curious point upon the construction of an order made by Master JELF on Jan. 11, 1940. The matter arises in this way. The present appellants obtained a judgment against the respondent, and then applied for leave to issue execution on, or otherwise proceed to the enforcement of, the judgment under the Courts (Emergency Powers) Act, 1939, s. 1. That leave they obtained, subject to a provision which was inserted in the order to the following effect :

> And it is further ordered that execution be suspended provided that £10 be paid on Feb. 1, 1940, and £10 per month thereafter.

The respondent duly paid the £10 on Feb. 1. The next payment of £10 was in fact not paid till Mar. 5, for reasons into which it is not relevant to enter. We are concerned here, not with the merits of the matter, but with a bare question of law. The payment not having been made on Mar. 1, which was the latest date on which the appellants contended it ought to have been made, a bankruptcy notice was issued on Mar. 2. That was followed by an application by the respondent, the debtor, to set aside the bankruptcy notice. Mr. Registrar PARTON acceded to that application, and set aside the bankruptcy notice. From his decision the present appeal is brought.

The contention which found favour with the registrar was that, upon the true construction of the provision in the order which I have read, the debtor had the whole of March in which to pay the second instalment, and, accordingly, that, payment having been made on Mar. 5, no default had occurred. As against that, it is contended by the judgment creditors, the appellants, that the last day for the payment of the second instalment was Mar. 1, that, accordingly, there was a default, and that the bankruptcy notice was properly issued.

The point is a very short one. We start off with the fact that in this order the word " month " has to be construed as meaning " calendar month," pursuant to the provisions of R.S.C., Ord. 64, r. 1. Accordingly, the phrase "£10 per month thereafter" must be construed as meaning "£10 per calendar month thereafter."

In approaching a matter of this kind, I do not think that it is putting it too high to say that one expects to find that the periodical payments which are contemplated will fall to be made at regular intervals. True it is that, if the language points to irregularity, it must be given its full effect, but I think that we are entitled to approach the construction of this phrase with a leaning—I put it no higher than that—towards regularity in the intervals for payment. The contention which found favour with Mr Registrar PARTON leads to irregularity in the periods of payment of a very strange kind. If the argument is correct, the second payment could be made on Mar. 2, the next payment on Apr. 3, the next payment on May 4. and so on, or at other intervals. However, when the last day of a month had been reached by that process—for example, the end of August—the next payment would have to be made in the month of September, and there would not be more than a month for that particular payment. In other words, the irregularity in the intervals of payment would automatically come to an end in that way. If the order, when properly construed, has a meaning of that kind, due effect must be given to its language. In my opinion, however, that is not the meaning of this order. The phrase, if I may repeat it again, is "£10 be paid on Feb. 1, 1940, and £10 per month thereafter." The word "thereafter" points to some time from which the subsequent months are to be calculated. The construction put forward by the respondent is that the word "thereafter" refers to February, and that, accordingly, when the order says "£10 be paid on Feb. 1, 1940, and £10 per month thereafter," it means that for every calendar month subsequent to February a payment of £10 is to be made, which would mean that the months there referred to would be the named months of the calendar. That construction would obviously be very much more difficult if the date for the first payment were not Feb. 1, but were some other date in February. However, quite apart from that, I cannot construe the word "thereafter" as referring to February. In my opinion, it refers to the date on which the first payment is to be made—namely, Feb. 1. The problem is, therefore, to find out in relation to each month the latest date when the payment of £10 must be made. If the months thereafter are to be calculated from Feb. 1, the second month will begin at midnight on Feb. 1-Feb. 2, and will end at midnight on Mar. 1-Mar. 2. Accordingly, the last day for payment of the second instalment would be Mar. 1, and so on in subsequent months. That appears to me to be the true meaning to be given to the word "thereafter." That construction, to my mind, has the great advantage of producing in the payments of instalments that regularity which one would expect to find in an order of this sort. The point is a very short one, but, in my opinion, the registrar was in error when he construed the order as he did. He ought to have dismissed the application to set aside the bankruptcy notice. In my opinion, therefore, this appeal should be allowed, with costs here and below.

Scott, L.J.: I agree.

Luxmoore, L.J.: I also agree.

Appeal allowed with costs in both courts.

Solicitors: *Woolfe & Woolfe* (for the appellants); *J. F. B. Satchell* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

TOOGOOD *v.* WRIGHT.

[Court of Appeal (Slesser and Clauson, L.JJ., and Singleton, J.), **April 5, 1940.]**

Animals—Liability of owner—Negligence—Racing greyhounds—Animals not on highway—Animals under control of two boys.

The plaintiff was bitten by one of two racing greyhounds who were in the charge of two boys aged 10 and 12 years respectively. The greyhounds were at the time in a 10-ft. way, which, though freely used by the public, was not in fact a highway. The dogs at the time were attacking a cat, and the plaintiff was bitten when attempting to rescue the cat. There was no proof of *scienter*, and it was found as a fact that many types of dogs are prone to chase cats and to bite anyone attempting to rescue a hunted animal:—

Held: there was no duty on the owner to take special precautions in the case of these dogs as being dangerous animals, and, no *scienter* being proved, the plaintiff could not recover.

[**EDITORIAL NOTE.** There being no proof of *scienter*, it was necessary to show that the racing greyhounds were animals which it was dangerous to allow to be taken out without special precautions against their getting out of control. On this point, the evidence is clear that such animals are not more dangerous in this respect than many other types of dogs, and, upon this finding, it is held that it is impossible to say that the law casts any especial duty in this respect upon the owner of racing greyhounds.

As to Negligence in Relation to Domestic Animals, see HALSBURY, Hailsham Edn., Vol. 1, p. 542, para. 932; and for Cases, see DIGEST, Vol. 2, pp. 229-233, Nos. 201-220.]

Cases referred to:

(1) *Turner* v. *Coates*, [1917] 1 K.B. 670; 2 Digest 235, *230*; 86 L.J.K.B. 321; 115 L.T. 766.

(2) *Deen* v. *Davies*, [1935] 2 K.B. 282; Digest Supp.; 104 L.J.K.B. 540; 153 L.T. 90.

(3) *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K.B. 370; 2 Digest 234, *226*; 85 L.J.K.B. 1289; 115 L.T. 129.

(4) *Aldham* v. *United Dairies (London), Ltd.*, [1939] 4 All E.R. 522; Digest Supp.

(5) *Pitcher* v. *Martin*, [1937] 3 All E.R. 918; Digest Supp.

(6) *Clinton* v. *Lyons & Co., Ltd.*, [1912] 3 K.B. 198; 2 Digest 236, *235*; 81 L.J.K.B. 923; 106 L.T. 988.

(7) *Jones* v. *Owen* (1871), 24 L.T. 587; 2 Digest 233, *219*.

Appeal by the plaintiff from a judgment of His Honour Judge Mitchell Banks, K.C., given at Kingston-upon-Hull County Court on Feb. 15, 1940. The facts are fully set out in the judgment of Slesser, L.J. The county court judge found as a fact that neither of the dogs had ever attacked any animals except wild rabbits, and that neither was peculiarly ferocious. It was common knowledge, however, that greyhounds were prone to chase any animal which fled from them, and, if they caught such animal, anybody who tried to take it away was likely to be bitten. Many other dogs, especially terriers, have the same characteristic. The dogs had been out many times under the care of the little boys, and had not chased a cat before. He could not limit his judgment to greyhounds: *Clinton* v. *Lyons & Co., Ltd.* (6). He could not find that the defendant was negligent in allowing the dogs to be taken out by the little boys. He distinguished *Jones* v. *Owen* (7) and *Pitcher* v. *Martin* (5). In any event, the owner could not be expected to foresee that the dogs would bite a human being. It was not a probability or natural consequence of leaving a dog uncontrolled that it would chase a cat, catch it, and bite anyone who tried to rescue the cat. The plaintiff appealed.

G. H. B. Streatfeild, K.C., and *R. Withers Payne* for the appellant.

The respondent did not appear and was not represented.

Streatfeild, K.C.: These dogs were greyhounds trained for racing, and, therefore, should not be regarded as in the ordinary category of dogs. They required more than normal control. They were especially likely to chase and kill cats, if they could. To send them in charge of two small boys into a town where they were likely to meet cats frequently amounted to negligence. [Counsel referred to *Deen* v. *Davies* (2), *Aldham* v. *United Dairies (London), Ltd.* (4) and *Pitcher* v. *Martin* (5).]

Slesser, L.J.: The facts are these. On Sept. 18, 1939, the plaintiff, Mrs. Rose Toogood, was in the dining-room of her house when she heard a scream from her little girl in the garden. She ran out and found that in a 10-ft. way, as it is called, behind her garden, which, though it is not a highway, is a place used freely and without hindrance by the public, two greyhounds were worrying her cat. She made several attempts to rescue the cat, but it was killed by the dogs. In the course of these attempts one of the dogs bit her. These two dogs were racing greyhounds, the property of the defendant, and they had been taken out by two small boys, aged 10 years and 12 years respectively, who were physically quite unable to control these powerful dogs when the dogs proposed to chase anything.

In the court below, there was an attempt made to prove *scienter*, but the evidence on that matter failed to satisfy the judge, who held that the defendant was not possessed of any knowledge that the dogs were of a fierce or mischievous nature, accustomed to bite mankind or attack cats, and no appeal is founded upon that matter. The case before us, therefore,

is sought to be put merely on the ground of negligence. The way in which the case was argued was this. It is said that the evidence proved, and that the county court judge has found in his judgment, that greyhounds are prone to chase any animal which flees from them, such as a rabbit or a cat, and that, that being so, although they are domestic animals, this defendant must be taken to have known that these particular A
domestic animals which he cherished were prone to chase cats, and, further, that, if they caught a cat, anybody who tried to take it away from them might be bitten. The judge has also found that other animals also are similarly prone to chase animals. He says:

B

> I am satisfied on the evidence, as well as from common knowledge, that many other types of dogs would be just as likely to chase a cat, and to bite the rescuer of a cat, as these dogs are.

Therefore, as it seems to me, he has found that there are no such special circumstances, in the way in which these dogs were dealt with, as would enable the plaintiff to say that there was placed upon the defendant C
any particular duty as having under his control particularly dangerous animals.

In cases like *Turner* v. *Coates* (1), for example, where an unbroken pony was allowed to go loose behind a mare, it was found, at p. 670:

D

> . . . that it was well-known . . . that a young unbroken colt when loose on the highway is apt, when startled, to rush about and to kick, and that there is grave risk of danger to the public in allowing such a colt to go loose on the highway in the dark . . .

As I read the judgment in the present case, the county court judge has declined to hold that there was any peculiar danger to be expected in the particular case of a dog known as a racing greyhound—namely, E
that it would chase cats—which would not equally apply to other types of dogs, which, to quote the county court judge, are "just as likely to chase a cat and to bite the rescuer." He has found that the evidence failed to satisfy him that there is any peculiar peril attaching to keeping a racing greyhound which does not attach to the keeping of many other F
types of dogs. Indeed, in giving evidence, one Goby, proprietor of a dog-track, having stated that "A greyhound will chase anything moving, it has an instinct to chase," said: "Foxterriers are often just as bad." I am rather afraid that the argument of counsel for the appellant, if acceded to, would lead to the compulsory imprisonment of a large portion G
of the canine race. I for one am not prepared to say that the county court judge was wrong in coming to the conclusion that, in the absence of any *scienter*, or of any knowledge of mischievous propensities, there was no negligence on the part of the owner of these dogs in allowing them to go out in the way in which he did. It seems to me that there H
was ample evidence to satisfy the county court judge that there was no such particular duty attaching in this particular case. As the county court judge very properly points out, there may be cases where inadequate control of animals may lead to a breach of duty, such as *Deen* v. *Davies* (2) and *Heath's Garage, Ltd.* v. *Hodges* (3), and other cases

which have been cited to the court in the present case, but here the evidence was amply sufficient for the county court judge to come to the conclusion that there was no reason why this particular owner should know, or have any reason to believe, that these dogs more than any other dogs, or many other classes of dogs, would be likely to do the damage which was in fact done. In those circumstances, I think that the county court judge was right, and that this appeal fails.

CLAUSON, L.J.: I agree. I venture only to add this. The damage to the plaintiff occurred within the curtilage of her own garden, where the dog bit her. This is not a case of a complaint by a person using a highway that his user of the highway was being improperly interfered with by reason of some negligence on the part of an owner of a domestic animal. I say that only in order that there may not be any misunderstanding as to the ambit of the decision in the present case.

SINGLETON, J.: I agree. The claim which was brought was clearly based on an allegation that there was negligence on the part of the defendant. The county court judge finds:

> These dogs had been out many times under the care of the little boys, and had not chased a cat before, till on this particular morning Mrs. Toogood's cat appeared on the pavement only a few yards from them, when they instantly succumbed to the temptation and gave chase, and the little boys were unable to hold them.

The boys were 10 years of age and 12 years of age respectively. The county court judge further said:

> I do not think that I ought to find that the defendant was negligent in allowing the dogs to be taken out by the little boys.

With that finding and with that statement I am in complete agreement.

Appeal dismissed.

Solicitors: *Russell Jones & Co.*, agents for *Pearlman & Rosen*, Hull (for the appellant).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

GOODCHILD *v.* ROMFORD BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Stable, J.), **March 18, 19, 1940.**]

Emergency Legislation—Air-raid precautions—Provision of air-raid shelter—Commercial building—Arcade consisting of number of buildings in each of which less than 50 *persons employed—Air-raid Precautions Act,* 1937 (*c.* 6)—*Civil Defence Act,* 1939 (*c.* 31), *ss.* 14, 15, 16, 17, 19, 30, 89 (5), 90.

The plaintiff was a freeholder of land which he had developed as an arcade. It consisted of a number of shops, and included a covered footway, which, however, had never been dedicated to the public as a highway. Some 160 persons were employed in the various premises owned and let by the plaintiff, but in no one of the separate lettings were 50 persons employed. The plaintiff had conveyed a part of the site of the arcade to a company which had erected a number of shops structurally connected with those of the plaintiff and forming part of the arcade. A substantial part of the property was leased to a company which built on that and on other adjoining land a large building structurally connected with the plaintiff's buildings but in itself quite a separate building. The action was for a declaration that the property in question was not "a commercial building" within the meaning of the Civil Defence Act, 1939, and that in consequence the notice was *ultra vires* :—

HELD : the plaintiff's premises were not a commercial building within the meaning of the Civil Defence Act, 1939, s. 89 (5), and he could not be required to furnish air-raid shelter for the persons employed therein. A

[**EDITORIAL NOTE.** Considerable difficulty has been found in properly construing the definition of a commercial building in the Civil Defence Act, 1939. The matter is one of importance, since onerous duties, involving in some cases heavy expenditure, are put upon the owners of such buildings. The case also considers the position of the owner of part of a building which, considered as a whole, is a commercial building. B

AS TO COMMERCIAL BUILDINGS, see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Statutes, p. 33 *et seq.*]

Cases referred to : C

(1) *A.-G.* v. *Mutual Tontine Westminster Chambers Assocn., Ltd.* (1876), 1 Ex.D. 469.

(2) *Moir* v. *Williams*, [1892] 1 Q.B. 264 ; 34 Digest 583, *46* ; 61 L.J.M.C. 33 ; 66 L.T. 215.

(3) *Kimber* v. *Admans*, [1900] 1 Ch. 412 ; 40 Digest 318, *2698* ; 69 L.J.Ch. 296 ; 82 L.T. 136.

(4) *Grant* v. *Langston*, [1900] A.C. 383. D

(5) *Yorkshire Fire & Life Insurance Co.* v. *Clayton* (1881), 8 Q.B.D. 421 ; 42 Digest 681, *929* ; 51 L.J.Q.B. 82 ; 45 L.T. 697 ; 1 Tax Cas. 479.

(6) *Ilford Park Estates, Ltd.* v. *Jacobs*, [1903] 2 Ch. 522 ; 40 Digest 318, *2700* ; 72 L.J.Ch. 699 ; 89 L.T. 295.

(7) *St. Marylebone Assessment Committee* v. *Consolidated London Properties, Ltd.*, [1914] A.C. 870 ; 38 Digest 454, *202* ; 83 L.J.K.B. 1251 ; 111 L.T. 553. E

(8) *Consolidated London Properties, Ltd.* v. *Johnstone*, [1932] A.C. 351 ; Digest Supp. ; 101 L.J.K.B. 224 ; 17 Tax Cas. 231.

(9) *R.* v. *St. Giles without Cripplegate (Inhabitants)* (1863), 4 B. & S. 509 ; 31 Digest 52, *2002* ; 33 L.J.M.C. 3 ; 9 L.T. 411.

ACTION for a declaration that certain property of the plaintiff is not a F commercial building within the meaning of the Civil Defence Act, 1939, and for a consequent declaration that a notice served on the plaintiff by the defendants requiring him to provide air-raid shelter in respect of those premises was invalid and *ultra vires.* The facts are fully set out in the judgment. G

W. H. Cartwright Sharp, K.C., and *A. Karmel* (for *Denis Murphy*, on war service) for the plaintiff.

A. T. Denning, K.C., and *Percy Lamb* for the defendants.

Sharp, K.C. : The plaintiff is the freeholder of part only of the arcade, and the various shops in it are let on lease to his tenants and are H separate buildings. The arcade is not one commercial building within the Act.

Denning, K.C. : The arcade is really one building. From a structural point of view, the building includes, not only the plaintiff's property referred to in the notice, but also the property of the London Co-operative

Society, Ltd., J. Lyons & Co., and Upsons. What is the effect of a building being in different ownership? Each owner is liable for his own part. There is no provision for an apportionment. There is no reason why the section should not apply to a part of a building: sect. 30 (2). The structure may be divided into many buildings for the purposes of the A Act. Ownership is the right test: sect. 15 (4) of the Act. [Counsel referred to *Grant* v. *Langston* (4), *Kimber* v. *Admans* (3), *Ilford Park Estates, Ltd.* v. *Jacobs* (6), *St. Marylebone Assessment Committee* v. *Consolidated London Properties, Ltd.* (7), *Consolidated London Properties, Ltd.* v. *Johnstone* (8), *A.-G.* v. *Mutual Tontine Westminster Chambers* B *Assocn., Ltd.* (1) and *R.* v. *St. Giles without Cripplegate* (*Inhabitants*) (9).]

STABLE, J.: In this case, the plaintiff sues the Romford Borough Council for a declaration that certain property of his in the Quadrant Arcade at Romford is not a commercial building within the meaning of C the Civil Defence Act, 1939, and for a consequent declaration that the notice, dated Dec. 1, 1939, which was served on him by the defendant council is invalid and *ultra vires*. The council by their defence challenge the plaintiff's right to the relief which he seeks, and ask for a declaration that something or another which belongs to the plaintiff is a commercial D building within the meaning of the Civil Defence Act, 1939. What that something or another is is put in the alternative in the counterclaim, and I am left to decide, first of all, whether or not there is a commercial building of which the plaintiff is the owner in the Quadrant Arcade, Romford, and, if so, what part of the arcade it is. The question very largely depends E on the construction of the Civil Defence Act, 1939, in relation to these premises at Romford. Whether it is really a question of construction for me to judge, or whether it is a question of fact which would be left to the jury if the case were being tried by a jury, I do not know, and perhaps it does not matter, as I have to perform both those roles.

F The facts are really hardly in dispute. Goodchild is the owner of a considerable area of land within the Romford Borough. He acquired the land with the idea of developing it into what may be roughly described as a shopping centre, and by a conveyance, dated Feb. 23, 1933, he conveyed a part of his purchase to a limited company named Upsons. G In the conveyance by which he conveyed that land, there were a number of mutual convenants the effect of which was that Upsons were to develop the part of the land which they were buying by building a part of an arcade with shop property, the land having a substantial frontage to South Street, and the balance of the land was to remain in Goodchild's H ownership, and, when the time came, he was to develop that along similar lines. Upsons took to themselves and their successors and all persons authorised by them a right of way and passage at all times and for all purposes, but on foot only, over and along the intended arcade to be known as the Quadrant Arcade leading from South Street to Market Place, Romford. Under the terms of the conveyance, Goodchild retained or acquired a right to tie his part of the arcade when it was built, which came up to Upsons' part of the arcade, into Upsons' wall.

After Upsons had completed the building on their site, Goodchild got to work on his, and in due course he built a frontage on to Market Place, which frontage consists of shop fronts, topped by two storeys of offices, which appear at least in two cases to be let to insurance companies. A
Down the length of the arcade, and round the turn to the right in the direction of Upsons, he built a number of shops. I might mention in passing, without going into the matter in elaborate detail, that a substantial part of Goodchild's property was leased by him to the London Co-operative Society, Ltd., and that part forms a part of the London B
Co-operative Society's building, or premises, to use a neutral term, the remainder of which is on land of which Goodchild is not the owner in fee simple. One of his shops, No. 25, which was let to J. Lyons & Co., has had the entrance into the arcade blocked up. The back wall has been removed, and it has been incorporated into the remainder of Lyons C
& Co.'s shop, which fronts on South Street. Hills & Steele's shop, which has a big frontage on Market Place, also comprises part of the shop No. 28 which fronts on the Quadrant Arcade, so that it has access, first of all, to Market Place, and also to the Quadrant Arcade. The rest of the property consists of shops, with the qualification that there D
are two floors of offices over the building which fronts on Market Place.

The first question—and, indeed, I think, the only question, apart from the main questions in issue—as to which there is any real difference between the parties is the exact status of the Quadrant Arcade. Counsel for the plaintiff put forward an argument as if the Quadrant Arcade had E
been dedicated to the public. That course is completely open to him if this matter goes further than this court, but his argument on that point was somewhat curtailed by me, for the reason that, as I was in his favour on other grounds, it seemed an unnecessary use of time on a matter which was not going to affect my decision. F

In my view, there is no evidence in this case upon which I can find that the Quadrant Arcade ever has been dedicated to the public, or that the public as such has any right which can be permanently asserted as against Goodchild to pass down the arcade from South Street to Market Place or from Market Place to South Street. The public, of course, does G
use the arcade, but the public uses the arcade because in various leases Goodchild has granted certain privileges to the tenants who have taken his shops. He has expressly created benefits to the tenants by conferring on them a right of way to themselves, their servants, workmen and others wishing to visit their shops, over the Quadrant Arcade from H
Market Place to South Street to and from the shops.

In those circumstances, it seems to me that the proper inference which ought to be drawn as to why people use, or by what right people are allowed, a right of way through the arcade is that, for the benefit of his tenants, Goodchild contracted with them that their shops should be made available to the public in that way. To deal with matters of pure fact, it was proved before me that up to Nov., 1937, Goodchild was in the habit of blocking up the arcade at each extremity with a sort of portable trellis-work, but that, in deference to a complaint by one of the tenants, that practice had been abandoned. The only obstruction to-day is a black-out screen, which does not prevent people from going down the arcade. As to the actual passageway, I should add that Goodchild is responsible for the cleaning of the passage, and for the lighting, and so forth.

As I have said, the various properties—or premises, again to use a neutral phrase—which comprise Goodchild's property are let out to a variety of shopkeepers who carry on a variety of businesses, and some of the offices are let as well. It is said by the borough council that Goodchild is the owner of a commercial building as defined by the Civil Defence Act, 1939, and that, accordingly, he is under an obligation to provide air-raid shelter. It is common ground that a notice was served on Goodchild by the defendant borough council. As to any question which there may be as to whether the notice precisely defines the commercial building, or whether the notice was at fault either by including something that was not a commercial building, or a part of a commercial building, or by leaving out something which properly was a part of a commercial building, if there was a commercial building at all, no point expressly dealing with those grounds was taken. The parties desired the matter to be decided on principle, and, if the borough council was right and Goodchild was wrong, and if Goodchild was the owner of a commercial building within the meaning of the Act, then no point was taken as to any defect which there might be in the notice.

The question is whether or not at the material times Goodchild was the owner of a commercial building as defined by the Act of Parliament. When one looks at the Civil Defence Act, 1939, one finds that that Act and the Air-raid Precautions Act, 1937, impose, first of all, on the local authority, putting it in quite general terms, an obligation to provide the public with a protection against raids from the air. That is an obligation which is placed on various local authorities. That seems to be their duty, and the Minister has power to make them do it. In the Civil Defence Act, 1939, Part III, there are certain provisions relating to the construction of what are called private shelters, and to training as respects the routine to be followed in certain factories, mines and buildings in the event of an air raid, so that a certain degree of discipline and order shall be observed where masses of people are working together. Of the various sections of the Civil Defence Act, 1939, sect. 14 provides that it shall be the duty of every person who is the owner of any commercial building to do certain things. Then sect. 15 confers on the owner of a commercial building powers of various kinds which he would not otherwise have, including the power to provide air-raid shelter on land which does not happen to belong to him. Sect. 16 enables the local authority to serve on the owner of a commercial building a notice in writing requiring him to provide air-raid shelter of the approved standard for all or any of the persons working or living in the commercial building. Then there are various provisions about the notice, one being for the infliction of penalties on persons who receive the notice and do not comply with the terms of it. Sect. 16 is also important in that it is one of the sections—and only one of the sections, for there are others—which make it quite plain that this legislation contemplates a possible case where the owner of a particular commercial building is not the occupier of the whole of it, or, indeed, of any of it. Sect. 17 deals with appeals to the Minister. I do not think I need dwell upon that. Sect. 19 is important. It contains a number of provisions as to commercial buildings where the owner does not occupy the whole building. The effect of the section can be summarised by saying that it enables the owner who is not the occupier of the whole building, and who has had to incur expense in providing air-raid shelter, to get the money back from the occupiers. It also enables the occupiers whose property has depreciated in value by the provision of air-raid shelter to obtain relief in respect of that. There are a number of other sections in the Act to which I do not think that I need refer.

Then we come to sect. 30. A good deal of stress was laid on sect. 30. That section provides—again to summarise the wording of the Act—that the owner of a building or block of buildings which are residential buildings is placed under an obligation to provide air-raid shelters for the persons living and working in the building or block, and there is a proviso that so much of the building or block of buildings as consists of, or is comprised in, any factory premises or commercial building shall be disregarded.

Counsel for the defendants cited that section as indicating that the legislature must have had in mind the possibility that a commercial building, or an entity which could properly be described as a commercial building within the meaning of the Act, might also form part of another building. In other words, they must have had in mind the possibility that a commercial building might be a part as well as a whole. I do not think that I need refer to anything very specific in the Act until we come to sect. 89, the all-important definition section. Sect. 89 (5) provides as follows:

> In this Act the expression "commercial building" means a building in which more than 50 persons work. . . .

Then certain things are excluded—schools, colleges, and so on, and buildings wholly occupied by public utility undertakers. Then there is a proviso as follows:

> Provided that (i) no building which forms part of any factory premises or mine shall be deemed to be a commercial building; and (ii) any residential part of a building (that is to say, any part which is used, or, so far as unoccupied, intended for use, for residential purposes) shall, if it is provided with a means of normal egress from the building which is not available to occupants of the non-residential part of the build-

ing, be disregarded for all the purposes of the provisions of this Act relating to commercial buildings.

Then in sect. 90 we have the following definition of an "owner" in relation to a commercial building:

> . . . (*a*) where there is no lease of the whole of the premises or building the unexpired term of which is 10 years or more, the person in whom the fee simple of the premises or building is vested; or (*b*) where there is such a lease, the person in whom the term created by that lease is vested or, if there are two or more such leases, the person in whom is vested that one of those leases on which all the others are reversionary.

To clear the ground, apart from certain leases I think that all Goodchild's shops are let for unexpired periods of more than 10 years, and in none of the properties comprised in the several leases are there more than, or as many as, 50 persons employed. If one takes all the shops and offices, and so on, held under lease from Goodchild, the number of employees is something between 160 and 200. That is the figure given in evidence, but I do not think that it professes to be more than an approximate figure. The point of it is that, if one takes the whole of the premises in the aggregate, not more than 50 people are employed in any one shop. If one takes any one shop or block of offices, in none of them are there anything like as many as 50 persons employed. My attention was also called to the section in the Civil Defence Act, 1939, which introduces a recital which is applicable to Scotland alone. That actually appears in sect. 91 (11). I mention that, but I am bound to say that I do not think that that subsection really assists me one way or the other in this case.

The question here is whether or not Goodchild was the owner of a commercial building within the meaning of the Civil Defence Act, 1939. The question may be quite simple, but the answer, I think, is difficult. That Goodchild was the owner of something there is no doubt. In him was vested the fee simple of this large area of land and everything which stood on it. Nor was there in existence a person who held a lease of the whole of that land, although there was a very large number of persons who held leases of various parts of it. Goodchild was the owner of something. Was that something a commercial building as defined by the Act? The meaning of "commercial building" is, first of all, that it is a building, and then it has to be not merely a building but also a building in which more than 50 persons work. I need not refer again to the fact that certain classes of buildings which otherwise would come within that definition are excluded—schools, colleges, universities, hotels, restaurants, clubs, places of public entertainment, and so on. The word "building" is a word which can quite accurately be used to give a general description of a number of vastly different things. Westminster Abbey may be described as a building, and so may a pig-sty, provided that it is a substantial one, and between the two there is an infinite variety, when regarded from the point of view of the material of which they are constructed, the architectural appearance, and the use to which the building is put. If one is asked to define a building, however, it may be extremely difficult, and I am certainly not going to attempt to provide a definition which would satisfy everybody. On the other hand, if one were shown a concrete object and were asked, "Is that a building?" one would have extremely little difficulty in saying Yes or No, although opinions might differ as to whether the Law Courts, A together with the addition of the Probate, Divorce and Admiralty Division, could be more accurately described as one building consisting of two wings, or two buildings joined together by a passage. Speaking generally, however, there is little difficulty, in dealing with an erection of bricks and concrete, in indicating to anybody what one means by B a building, and of what the building consists.

At the outset, the borough council here seem to me to be in the difficulty that, although their counsel, if I may say so, with great clarity endeavoured to persuade me that Goodchild is the owner of a building, he had considerable difficulty in telling me of what that building consisted. C If I may deal with the case simply in the light of pure common sense, looking at these plans in the first place, I think that no one in his senses could describe this as a building. Obviously it is nothing of the kind. How many buildings it consists of it is not very easy to say offhand, without going round the whole arcade. The front on Market D Place is a totally different building from all the little shops running along the L-shaped arcade. It is totally different from that part of Goodchild's property which now forms a part of the London Co-operative Society's building—a part which is simply let in to the Co-operative Society's building, a great deal of which stands on some- E body else's land. Again, it is a totally different building from the building which one sees in certain of the photographs in evidence, and we know that the front on South Street was completed by Upsons, different owners, before the work on Goodchild's land was even begun.

It is argued here that I must say that this conglomeration of com- F mercial premises, the rows of shops, the offices, and the entrance part of the London Co-operative Society's shop, the bit which stands on Goodchild's land, without any sort of partition, and merges into the rest of the Co-operative Society's shop, which is on somebody else's land, is all a commercial building. I think that the answer is that it is not. One G has only to look at it to see that. What is there to make it a commercial building? What is it that can be said to weld it into one entity? It is said, first of all, that, because Goodchild owns all of it, that makes it one building. The answer to that seems to me twofold. First of all, Goodchild does not own all of it if we regard the structural whole H as being the "it" about which we are talking, because part of it belongs to Upsons. It has been said that, because Goodchild's property happens to be in one ownership, that can turn it into a building. The mere fact that the ownership is in the same hands cannot, in my judgment, alter the nature of the thing itself. A lot of different things, a con-

glomeration of shops and offices, and all the rest of it, cannot be turned into a building merely because those things happen to belong to the same man. It seems to me that that is not the factor. That is looking at the problem from the wrong point of view. One has to look at the thing itself, and ask: "Does it come within the definition of a commercial
A building in this Act of Parliament?" What is there to make this conglomeration into a commercial building? It is said—and I accept it—that there is a certain structural unity. That, however, is no more than can be said of every street of houses which happen to touch one another. Goodchild's arcade is pinned into Upsons' wall, and, therefore,
B a certain amount of support is derived from Upsons' property, and so all down the chain until we reach the entrance in Market Place. To that extent, there is a certain structural unity about the whole property. Let it be remembered, however, that that structural unity is not a unity which consists of Goodchild's property. It is a unity which
C comprises Goodchild's property, Upsons' property, and a considerable part of the property which is in the occupation of, and under lease to, the London Co-operative Society.

Another very strong point which was urged on me was that this is a commercial building because each part of it has ingress to, and egress
D from, the arcade. That is right. All these shops have access to the arcade, with the exception of the shop which J. Lyons & Co. now occupy. They deliberately closed the access which they could have had to the arcade, but there is nothing to prevent them from renewing that access if they want to do so. Just as a common doorway and a common
E staircase, and so on, are some of the determining factors in deciding whether a particular structure is one building or more than one building, so the existence of this arcade, beginning at Market Place and turning to the right, cannot bring all the properties adjacent to it into the category of buildings which are one building. It seems to me that there is no
F real parallel between the staircase which runs up and down a building and an arcade which may be miles long, and which, indeed, may be fringed by a number of buildings which may be wholly and absolutely detached one from the other. The mere fact that what are two buildings in the common sense both have access to, and egress from, the same
G arcade does not make the two buildings one, and I do not think that it has that effect in the case which is before me now.

Before parting with the case, I think that I ought to make a brief reference to the authorities. The first one, I think, was *A.-G.* v. *Mutual Tontine Westminster Chambers Asscn., Ltd.* (1), which was in the Court
H of Appeal. It depended on the construction of a Revenue Act, and it was held that, under the provisions of that Act of Parliament, and more particularly r. 6, the association were rightly assessed as the occupiers of one building, as the position involved a finding that the particular building in question was in the category of a house, and those words were used in the Act of Parliament in

question. SIR GEORGE JESSEL, M.R., decided, at p. 476, that he had to take the word "house" as being used in its ordinary sense, and, using the word in its ordinary sense, and looking at the building he was dealing with, he said that the question was whether or not that was a house, and he held that it was. I venture to think that the answer to the question I have to decide—namely, whether this is one building or a A number of buildings—is perfectly obvious. It is that here we have a number of buildings, and not one.

The next case is *Moir* v. *Williams* (2). In that case, which comes under another Act of Parliament, the building consisted of one large building in which were erected a series of structures containing 14 sets B of chambers, and the district surveyor claimed to be entitled to a fee in respect of each set of chambers as a separate building. He was demanding a fee in respect of each of the 14 sets of chambers, and the court held, in dealing with that claim under that Act of Parliament, that, having regard to the subject-matter, the surveyor was entitled C to one fee, and to one fee alone, in respect of the whole structure, because, although there were 14 different sets of chambers in it, it was only one building.

The next case is *Kimber* v. *Admans* (3), which is a case of a covenant not to erect more than a certain number of houses. The defendant, D who had given the covenant, purported to erect one building, which contained several residential flats under the same roof, and it was held that so to do was not a breach of the covenant. VAUGHAN WILLIAMS, L.J., says, at p. 416:

> . . . I think one must, in construing this restrictive covenant, ask oneself what was the E object of the covenant and if I found myself in such a position that I could see no object in the covenant if it was simply limited to the bricks and mortar erection, I should have been disposed to put upon the word "house" a meaning which would cover the user of the house as distinguished from the physical erection. But I do not find myself in that position, and I do not think that anyone who is familiar with building estates in London would have any difficulty in ascertaining the object of this covenant, if we construe it as a covenant in which the word F "house" means the physical erection and not the interior arrangement.

The next case is *Grant* v. *Langston* (4), the headnote to which reads as follows:

> The appellant was the owner of a building of two storeys under one roof situate in Portobello, Edinburgh. The ground-floor was occupied by the appellant to carry on the trade of a licensed retailer of spirits . . . The upper storey was occupied G by the appellant as his dwelling-house . . . Access to the dwelling-house was by a door opening from the public street and by a staircase from that door which led up to the upper storey. Access to the public-house was by a different door also opening from the street. There was no internal communication between the dwelling-house upon the upper storey and the public-house on the ground-floor:—
>
> HELD, reversing the decision of the First Division of the Court of Session, that the public-house was exempt from inhabited house duty, and that the duty ought to be confined to the value of that portion of the building used as a dwelling-house. H

I think that it is important and particularly helpful to deal with the observations of the EARL OF HALSBURY, L.C., at pp. 391, 392:

> I think the original idea of an inhabited house was that of a building inhabited by one person (with his family) responsible for the tax, who was himself the inhabitant of the whole of the house. But very soon questions began to be raised as to what constituted the unity of a house; one side of a whole street is in one

sense structurally one building, but the separate unity of each of the structures with all its arrangements for occupation by one family and its head was of course recognised as a house separately liable to the tax. Even semi-detached houses were always recognised as two houses, although they were structurally one and protected by one roof; but controversies have arisen in respect of rating for the poor, for purposes of taxation and for the franchise, and decisions have been arrived at not always satisfactory or reconcilable with each other. An outer door and a common or separate staircase have been most commonly the tests applied, and I am not myself able to see how the case of chambers in an Inn of Court and the decision of the *Westminster* case (1) are reconcilable with each other. But the legislature went further, in spite of artificially creating more artificial houses than one out of a house which was in every ordinary sense one taxable house, by giving from time to time exemptions from taxation to parts of structures which were structures adapted and probably intended originally for the occupation of one inhabitant as head of a family. Sir George Jessel, M.R., himself in *Yorkshire Fire & Life Insurance Co.* v. *Clayton* (5) said [p. 424] . . . "in modern times a practice has grown up of putting separate houses one above the other. They are built in separate flats or storeys, but for all legal and ordinary purposes they are separate houses."

Now, it appears to me that, apart from the exemption created by the Act 41 & 42 Vict. c. 15, s. 13, I should have great difficulty in holding this building to be one inhabited house within the various alterations which the legislature has introduced into what it has for fiscal purposes called a "house." It appears to me that in the language of Sir George Jessel, M.R., there are two houses built one above the other. I suppose no one would dream of calling them one house if the same conditions which are found to exist here were found to exist in the same structures built side by side, and not one above the other, and, if it is possible to have one house built over another house, then all that has been held to constitute a separate house exists here: there is nothing which is held in common; the one structure is superposed upon the other, and that is all.

In this case, I see nothing in common between these various buildings except that they are parts of the same structure in the sense in which the Earl of Halsbury, L.C., uses that word—namely, that one side of a whole street is in one sense structurally one building.

The last case to which I was referred was *Ilford Park Estates, Ltd.* v. *Jacobs* (6), in which the headnote is as follows:

> A building structurally divided into two tenements on different floors, with no internal communication, common staircase, or common front door, constitutes two houses within the meaning of a covenant not to erect more than one house on the site.

The important part of that case is that, although these houses were divided into two tenements, they had no internal communication. They had no common staircase or common front door. The two front doors did meet under a common archway, but the common archway was not regarded as sufficient to constitute the two tenements one house as opposed to two.

I have referred to these cases. There were other cases cited, but I do not think that I need deal with them all, because one has to consider the particular Acts of Parliament which were under discussion in each particular case, and I think that really all these cases come down to this question of fact—namely, if one has regard to the Act of Parliament one is considering, is this building one commercial building or not? That can only be answered in one way. It is not a commercial building. It is a number of buildings, and each of those buildings would be a commercial building if it was big enough to have 50 people or more employed inside it. Because it is not big enough, one cannot con-

glomerate them all into a sort of whole and say: "Pool the lot. Call them a commercial building, because they all look out on to the same arcade, and are all linked together by a wall, and all belong to the same man." I do not think that this case comes within the Civil Defence Act, 1939, which seems to me to call on the owner of what is obviously to anybody a building in which more than 50 people are at work to A
provide those people with air-raid shelter. That is a totally different thing from calling on the owner of a vast number of different shops spread out in an arcade to provide air-raid protection for people who are working in those shops. That obligation seems to rest on the local authority, and I see no particular reason why in this case that obligation should be B
shifted from the local authority to Goodchild.

There is just one further matter with which I think I should deal. It was urged that, on the evidence, it was really quite plain that what I may call the structural unity was comprised in, or extended to, the London Co-operative Society's building, Upsons' building and the C
buildings fronting on Market Place, as well as the shops along the arcade, and it was said that there is there a commercial building. I find, whether it be law or fact, that that entity was not a commercial building at all. It was a number of commercial buildings. If I am wrong in that, then, in my judgment, the claim of the borough council fails, because Goodchild D
never was the owner of that building. He was the owner of some part of that building, and there is no machinery or provision in the Act of Parliament whereby the owner of a part of a commercial building can be made to provide a shelter such as is required in this case. It may be, of course, that there are cases in which, where one has separate ownerships, E
and a different user of different parts of the structure which are in different ownerships, that may well constitute two buildings. That case, of course, may arise, but, where one has what is obviously one building, and one building only, and there is nobody who owns all that building, then, in my view, there is no machinery in the Act whereby the owner of part F
of that building can be made responsible for the provision of air-raid shelter either for the persons who work in the part which he owns or for the persons who work throughout the whole of the building.

In my view, the claim of the Romford Borough Council fails on that ground as well, but, on the principal ground, it is clear, in my judgment, G
that there never was any building which one can describe as a commercial building of which Goodchild was the owner. He was in fact the owner of a number of buildings used for commercial purposes, any one of which would be a commercial building if, as I have said, there happened to be more than 50 people employed in it. In the result, the action succeeds, and H
Goodchild must be entitled to the relief which he asks.

Judgment for the plaintiff with costs.

Solicitors: *Hunt & Hunt* (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *J. Twinn*, Town Clerk, Romford (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* OLDHAM.

[KING'S BENCH DIVISION (Wrottesley, J.), **January 29, 30, February 23, 1940.**]

Estate and Other Death Duties—Gifts inter vivos—Gift of ordinary shares—Issue of bonus shares to ordinary shareholder on capitalisation of reserves—Whether estate duty payable in respect of bonus shares—Customs and Inland Revenue Act, 1881 (c. 12), *s.* 38 (2)*—Customs and Inland Revenue Act,* 1889 (c. 7), *s.* 11 (1)*—Finance Act,* 1894 (c. 30), *ss.* 1, 2 (1) (*c*), 7 (5), 22 (1) (*f*)*—Finance (1909-10) Act,* 1910 (c. 8), *s.* 59 (1).

On Jan. 26, 1934, the defendant's father gave to his daughter, the defendant, 25,000 shares in T. & L., Ltd. On May 9, 1935, the company capitalised £1,360,000 out of its general reserve by issuing 1,360,000 new ordinary shares to the ordinary shareholders in the proportion of 2 such shares for every 5 existing shares, with the result that the defendant was allotted 10,000 further ordinary shares. The defendant's father died on Apr. 30, 1936, and the Crown claimed that estate duty was then payable under the Customs and Inland Revenue Act, 1881, s. 38 (2) (as amended by the Customs and Inland Revenue Act, 1889, s. 11 (1), and the Finance (1909-10) Act, 1910, s. 59 (1)), and the Finance Act, 1894, s. 2 (1) (*c*), in respect of both the 25,000 and the 10,000 shares. The defendant admitted that duty was payable in respect of the 25,000 shares, but contended that it was not so payable in respect of the 10,000 shares:—

HELD: the 10,000 shares which the company chose to distribute to the defendant were not taken by her under the gift of the ordinary shares on Jan. 26, 1934, and therefore estate duty was not payable in respect of them upon the death of the defendant's father. Where the parties have clearly and truly stated the nature of the transaction, what may be said to be the substance of the transaction ought not to be regarded.

[**EDITORIAL NOTE.** The decision in this case must be compared with that in *Re Payne, Poplett* v. *A.-G.* (7). The matter which has to be determined in each case is what, upon its proper construction, passed under the deed of gift. Increments to a gift can more readily be traced where there is a trust fund, for then all such increments will be held by the trustees as part of the fund. The decision here, however, is based upon the construction of the taxing statute, and it is held that the definition of the property charged with the duty does not include the bonus shares here in question.

AS TO ESTATE DUTY ON GIFTS *Inter Vivos*, see HALSBURY, Hailsham Edn., Vol. 13, pp. 269-273, paras. 272-280; and FOR CASES, see DIGEST, Vol. 21, pp. 24, 25, Nos. 133-137.]

Cases referred to:

(1) *Lethbridge* v. *A.-G.*, [1907] A.C. 19; 21 Digest 18, *99*; 76 L.J.K.B. 84; 95 L.T. 842; *revsg.*, [1905] 2 K.B. 323.

(2) *A.-G.* v. *Montagu (Lord)*, [1904] A.C. 316; 21 Digest 25, *140*; 73 L.J.K.B. 707; 90 L.T. 726.

(3) *Cape Brandy Syndicate* v. *Inland Revenue Comrs.*, [1921] 2 K.B. 403; 42 Digest 666, *765*; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358.

(4) *Inland Revenue Comrs.* v. *Westminster (Duke)*, [1936] A.C. 1; Digest Supp.; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490.

(5) *Strathcona (Lord)* v. *Inland Revenue Comrs.*, [1929] S.C. 800; Digest Supp.

(6) *A.-G. for Ontario* v. *National Trust Co., Ltd.*, [1931] A.C. 818; Digest Supp.; 100 L.J.P.C. 215; 145 L.T. 673.

(7) *Re Payne, Poplett* v. *A.-G.*, [1939] 1 Ch. 865; [1939] 3 All E.R. 875; Digest Supp.; 161 L.T. 254; *affd.* [1940] 2 All E.R. 115.

(8) *Re Kuypers, Kuypers* v. *Kuypers*, [1925] Ch. 244; 40 Digest 661, *1997*; 94 L.J.Ch. 253; 133 L.T. 468.

INFORMATION to recover estate duty upon the death of George Booth Tate in respect of certain shares as property comprised in a voluntary disposition made by the deceased less than 3 years before his death. On Jan. 26, 1934, the deceased transferred by way of gift to the defendant, his daughter, 25,000 ordinary shares of £1 each in Tate & Lyle, Ltd. At this date, the capital of the company was £4,500,000, divided into 3,400,000 ordinary shares of £1 each and 1,100,000 6½ per cent. preference shares of £1 each, all of which had been issued. On May 9, 1935, the company passed resolutions to the effect that the capital of the company be increased to £6,200,000 by the creation of 1,700,000 new ordinary shares of £1 each, and that the sum of £1,360,000 standing to the credit of the general reserve be capitalised and applied in paying up 1,360,000 of the new shares, and that such shares be distributed among the holders of the ordinary shares in the proportion of 2 such shares for every 5 existing shares. Pursuant to these resolutions, the company allotted to the defendant 10,000 ordinary shares of £1 each credited as fully paid. The day before the company decided to make the distribution, the ordinary shares were worth £$5\frac{7}{16}$, and the day after they made the distribution they were worth £$3\frac{13}{16}$. The deceased died on Apr. 30, 1936. The Inland Revenue Commissioners claimed that estate duty at the appropriate rate became payable upon the death of the deceased under the Customs and Inland Revenue Act, 1881, s. 38 (2) (as amended by the Customs and Inland Revenue Act, 1889, s. 11 (1), and the Finance (1909-10) Act, 1910, s. 59 (1)) and the Finance Act, 1894, s. 2 (1) (*c*), in respect alike of the 25,000 shares in the company comprised in the original gift to the defendant and of the 10,000 bonus shares in the company allotted to her as holder of the 25,000 shares. The defendant admitted that duty was payable in respect of the 25,000 shares, but contended that duty was not payable in respect of the 10,000 shares.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *J. H. Stamp* for the informant.

R. F. Roxburgh, K.C., and *F. Heyworth Talbot* for the defendant.

WROTTESLEY, J.: The defendant's liability must depend upon the Finance Act, 1894, ss. 1, 2, 22. The relevant parts of these sections are as follows:

> 1. In the case of every person dying after the commencement of this part of this Act, there shall . . . be levied and paid, upon the principal value ascertained as herein-after provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called "estate duty."
>
> 2 (1). Property passing on the death of the deceased shall be deemed to include the property following, that is to say. . . .

Then follows in para. (*c*) a reference to property which would be required on the death of the deceased to be included in an account under the

Customs and Inland Revenue Act, 1881, s. 38 (2), as subsequently amended. So far as this case is concerned this statutory provision now reads thus: "Any property . . . taken under a disposition made by a person dying after Aug. 1, 1894, purporting to operate as an immediate gift *inter vivos* . . . which shall not have been *bona fide* made
A 3 years before the death of the deceased." To return now to sect. 1, this property, taken under such a disposition, is to bear estate duty levied on its principal value, and sect. 7 (5) provides that the principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market
B at the time of the death of the deceased. Finally, by sect. 22, the definition section, it is provided by subsect. (1) (*f*) that, unless the context otherwise requires:

> The expression "property" includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time
> C being representing the proceeds of sale . . .

Thus, the question is whether or not these bonus shares, issued to the defendant by the company in the manner I have indicated, are property taken under the disposition—that is to say, the gift which the deceased made of the ordinary shares, and which took place admittedly
D less than 3 years before his death. There are many and obvious difficulties in answering this question in the affirmative. These shares are property, but they are not gathered in by the definition section, for they are not the proceeds of sale of the ordinary shares, nor an investment for the time being representing the proceeds of sale of the ordinary shares.

E The case for the Crown depends, not on any literal reading of the relevant taxing statutes, but rather on my looking at the substance of the transaction. It is put thus. The thing which the deceased gave has in part changed its form in a way which arises from its inherent nature. The shares given represented certain rights against the company—
F namely, a right to receive in proportion any profit that was distributed, whether by way of dividend or by way of capital. There was this large sum of accumulated profit, and all that has happened is that the company has chosen to distribute this profit to the shareholders in the form of bonus shares. Thus, the 25,000 ordinary shares have now become
G 35,000 shares, and, after that accretion of capital, the shareholder is exactly where she was *vis-à-vis* the company and the other shareholders. Where she had 5 shares she now has 7, but, since that happened to every shareholder, they are all as they were. Thus, her father gave the defendant, not 5 shares, as he thought, but 7 shares, as we now know,
H and the values illustrated by the stock exchange prices before and after the distribution show clearly that that is so.

The debate has wandered over a wide area. Counsel for the informant have put before me cases tending to show that a literal construction will not do. For instance, if shares are divided up, it is said, one share becoming two, there is no difficulty in identifying the two shares with the one which gave rise to them. Nor is there. Then comes the mare which was believed to be in foal when given, or the cow in like case, the pedigree herd of cattle, the herd of deer, which I think counsel for the informant must mean to be in a park, as wild deer would hardly be an appropriate illustration. In another category is the block of shares settled on trustees. Here different considerations come into A play, for the law will, as it were, isolate and identify the subject-matter of a trust, even if the definition section of the Act of 1894 were not there to enable the Crown to follow the thing given into the proceeds of sale, and beyond it into the investment of those proceeds. Illustrations of this kind are interesting and instructive as showing how the B abstract rule can be applied easily, or with difficulty, to concrete cases. Some of them present real difficulties. The line of approach is seductive. If one can depart from the literal where a share loses its identity by being split, why stop there? However, neither the practice of the Crown in dealing with these cases nor the concessions which it is said the Crown C makes in some of these cases really throws any light on what the words of the statutes mean, provided those words are reasonably clear. I am invited to have regard to the substance of the transaction—that is to say, the company's act in distributing their reserves in the form of bonus shares. *Lethbridge* v. *A.-G.* (1) is relied upon, and especially what D was said by LORD ATKINSON, at p. 26:

> It has many times been decided that in dealing with questions arising on the Finance Act of 1894 and the Succession Duty Acts regard should be had to the substance of the transactions on which these questions turn rather than to the forms of conveyancing which the parties to them may have adopted to carry out their objects. E

If what is contended for is that the court must not close its eyes to what a transaction really provides, should that be different from what the form of the transaction appears to provide, there is no doubt that that is the duty of the court. That is what was in question in *A.-G.* v. *Montagu* (*Lord*) (2). In this case, however, I have to deal with a trans- F action the *bona fides* and true meaning of which are not challenged and not in doubt. It is no more wrong or *mala fide* that a man should give to his children before he dies what he no longer needs, or is prepared to part with, than that he should keep it until he dies and then leave it to them. The fact is that in this case we are not in a region where right G or wrong or good or bad faith obtains. Here the company decided to distribute the reserves as capital, for reasons which were, I suppose, satisfactory to the shareholders. They had nothing whatever to do with this case. The substance to which I am invited to have regard is a different kind of substance. In effect, I am invited to fill in the H gaps in the Act of 1894, and the only convincing reason why I should take on my shoulders this burden, which is really legislation rather than construction, is that, unless I do so, a subject will go to some extent untaxed in respect of a monetary advantage which came to her by reason of a gift from her father, and which is itself subject to tax. It is, of course, desirable that all subjects in like case should suffer the same tax, but, before I fill in such a gap, I must remember what ROWLATT, J., said in *Cape Brandy Syndicate* v. *Inland Revenue Comrs.* (3), at p. 366 :

> Now of course it is said and urged by Sir William Finlay that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think ; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment ; there is no equity about a tax ; there is no presumption as to a tax ; you read nothing in ; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax.

I must also remember what LORD TOMLIN said in *Inland Revenue Comrs.* v. *Westminster* (*Duke*) (4), at pp. 19, 20 :

> Apart, however, from the question of contract with which I have dealt, it is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called " the substance of the matter," and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting " the incertain and crooked cord of discretion " for " the golden and streight metwand of the law " (4 Inst. 41). Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of " the substance " seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

If, then, I need it, I have excellent authority for not accepting the invitation, however tempting, to theorise as to what Parliament must have intended to include in the phrase " property taken under a disposition " other than what is said. In plain English, it means " given to " a person. If it can be said that the defendant was given these bonus shares by her father, then equally it can be said that she was given every dividend which has accrued to her in respect of the ordinary shares. This appears to me not to be common sense. If the defendant were asked whether or not her father had given her those dividends, it would be an abuse of language for her to say that he had.

Another line of approach, though really leading to the same goal, is that through the cases on the method of valuation intended by the Act. Here again the problem posed by the Act is by no means always easy to solve. If one must treat something which a man gives early in 1934 as though he did not in fact do so, but kept it until he died in 1936, and then bequeathed it by will, one may easily find oneself in difficulties if one tries to value it at the later date and tax the donee on the latter value. In *Strathcona* (*Lord*) v. *Inland Revenue Comrs.* (5), the Court of Session had to consider how this valuation should be done, and the judgments in that case show how differently the problem may be

approached and solved by different minds. I do not think that I can derive any assistance in this case from any of the judgments in that case. The decision—anyhow of the majority—was that the valuation was to be made at the date of the donor's death, and that, in the case of shares, it would be the market price at the date of the donor's death. I accept that decision, which was upheld by the Privy Council in *A.-G.* A
for Ontario v. *National Trust Co., Ltd.* (6), and it is therefore the fact that in the case before me the ordinary shares which will anyhow bear the duty were (partly owing to the distribution of the reserves by way of bonus shares in 1935) less valuable, and so less productive of duty, than they would have been if that distribution had not taken place. B
That, of course, leaves unanswered the question of what value the shares would have had if the reserves had been distributed by way of dividend, as they might quite well have been.

Then came *Re Payne, Poplett* v. *A.-G.* (7), where the subject of the gift was settled and included the benefit of an option. The result was C
that on the date of death £10,000 and an option had become shares worth about £49,000. In that case, SIMONDS, J., held that, in the case of settled funds, the trust fund, in the condition in which it was at the date of the death of the donor, must be valued at the date of the donor's death, but he in terms confined his decision to the case of settled funds. D
Indeed, the whole of the argument and the grounds for the decision showed why the judge so confined his decision. Counsel for the informant says that the Act makes no special reference to settlement, and that, if settled funds can be followed through such changes, that is only because there is an underlying identity, and that SIMONDS, J., must E
have relied on this. The report of this case discloses no such necessity. In the case of a trust fund, the problem of identity is solved—or, at any rate, eased—by the circumstances which always surround such a fund, even if the definition section in the Act is not applicable. In the case before me, I have no such artificial aid to identification, and the definition F
section, as I have pointed out, does not apply. On the other hand, if I am to adopt what LORD SANDS said was the right course in *Strathcona (Lord)* v. *Inland Revenue Comrs.* (5), and to treat the matter as though the deceased had kept these shares till he died, bequeathing them by will at the moment of the gift, then, having regard to the date of the distribution G
of the bonus shares, the result is clear from *Re Kuypers, Kuypers* v. *Kuypers* (8). The bonus shares would not have gone to the defendant by reason of such a bequest. Incidentally, there will be found in the judgment of TOMLIN, J., in that case some interesting observations on how to trace and identify shares where an additional issue, not unlike H
the one in this case, had taken place. However, I do not base my decision on this ground. I look at the words of this taxing Act. I believe I look at the substance of it, in so far as its substance is to be gathered from its words. It might have contained words which would include these bonus shares. In fact, it contains no such words. I apply

the simplest test which can be used. I will assume that it had been to the defendant's interest to make out that in fact her father gave her these bonus shares. Could she truthfully have sworn that she received these bonus shares from her father? It is apparent, anyhow to me, that, if she had so sworn, she would have been guilty, if not of perjury, at
A any rate of concealing the truth. For this simple reason, I find that the bonus shares which the company chose to distribute to the defendant were not taken by her under the only disposition which can be relied upon—namely, the gift of the ordinary shares on Jan. 26, 1934.

Information dismissed with costs.

B

Solicitors: *Solicitor of Inland Revenue* (for the informant); *Pennefather & Co.* (for the defendant).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

C

INLAND REVENUE COMMISSIONERS *v.* WOLVERTON (LADY).

[KING'S BENCH DIVISION (Wrottesley, J.), **January 30, 31, 1940.**]

D *Income Tax—Sched. A—Occupation—Widow continuing to live in husband's house after his death and before residue of estate ascertained—Whether occupation in her own right or as representative of executors—Income Tax Act,* 1918 (c. 40), *Sched.* A.

The respondent was the widow and residuary legatee of W., who died on Oct. 3, 1932. Prior to his death, they had lived together on
E a partly leasehold and partly freehold property owned by him, and after his death the respondent continued to live there, employed and paid the servants, and kept up the grounds. The executors did not question her living there, and did not try to eject her. The residue of the estate was not ascertained until July 20, 1937. On Oct. 24, 1934, the executors assented to the vesting of the leasehold part of the property in the respondent, and on Jan. 13, 1938, they assented to the
F vesting of the freehold part of the property in the respondent. The question arose as to whether the annual value of the property should be included in the computation of the respondent's sur-tax for the years ending Apr. 5, 1933, to Apr. 5, 1937. It was contended on behalf of the respondent that the annual value of the property should not be so included, because, until the residue of the estate had been ascertained, she could not be said to be an occupier within the meaning
G of the Income Tax Acts, as her occupation of the property was not in her own right, and that she was occupying it as the representative of the executors:—

HELD: the respondent was the occupier of the property under the Income Tax Act, 1918, Sched. A.

[EDITORIAL NOTE. Where a person takes an interest under a will, there is
H a period of time during which that person has no right to deal with the property the subject of the gift. The interest under the will is said to be inchoate, and the full benefit of interest does not vest in the beneficiary until the executor has assented to the gift. Until that time arrives, the executor can at any time take the property for the purpose of discharging the debts of the testator, paying duties or discharging administration expenses. For this reason, it has been held in some cases that the tax upon the income of such property is to be assessed upon the executor, and not

upon the beneficiary. In the present case, however, a distinction is made, and the occupation of the house by the widow is held to be the occupation of the widow for the purposes of assessment under Sched. A.

As to Occupier for Purposes of Sched. A, see HALSBURY, Hailsham Edn., Vol. 17, pp. 50-53, paras. 98-104; and for Cases, see DIGEST, Vol. 28, pp. 14, 15, Nos. 71-74.]

A

Case Stated under the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The respondent, Lady Wolverton, was the widow of Lord Wolverton, who died on Oct. 3, 1932. Under his will, B she became entitled to an absolute interest in his residuary real and personal estate. The question raised in the appeal was whether or not the annual value of certain freehold and leasehold property, known as Queensbury House, Newmarket, part of the free estate of the testator, should be included in the computation of the respondent's sur-tax for C the years ending Apr. 5, 1933, to Apr. 5, 1937. The commissioners found that the residue of the estate was not ascertained until July 20, 1937. The respondent lived at Queensbury House at periods throughout the years in question. She employed and paid the servants, and kept up the grounds. The executors did not question her being there, and D did not try to eject her. On Oct. 24, 1934, they assented to the vesting in the respondent of the leasehold, and on Jan. 13, 1938, of the freehold, part of the property. It was contended on behalf of the respondent that the annual value of the property at Newmarket should not be included in the computation of her total income for the purposes of sur- E tax, because, until the residue of the estate had been ascertained, she could not be said to be an occupier within the meaning of the Income Tax Acts, as her occupation of the property was not in her own right, and she was occupying it as the representative of the executors of the will. On behalf of the appellants, it was contended as follows: F

(a) that throughout the period in question the respondent was the occupier of the property in question and occupied the same beneficially in the capacity of a tenant at will, and not as a caretaker or otherwise as the representative of the executors, and the fact that the residue of the estate was not ascertained was immaterial, and that, accordingly, the annual value thereof formed part of the total income; (b) that in any event having regard to the Administration of Estates Act, 1925, s. 36 (2), the annual value of the property formed part of the total G income of the respondent from the date of the death of her husband; (c) alternatively, that in any event the annual value of the leasehold part of the property were income of the respondent from Oct. 24, 1934.

The finding of the special commissioners was as follows:

We, the commissioners, found on the evidence that the residue of the estate was ascertained on July 20, 1937. We held that prior to this date the annual H value of the Newmarket property was not income subject to taxation in the hands of the respondent, and must be excluded in computing the sur-tax computations for the years in question. We allowed the appeal for all the said years.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellants.

F. Heyworth Talbot for the respondent.

Wrottesley, J.: This case appeared to bring forward for debate
the question whether or not a lady in the position of Lady Wolverton,
benefited by Lord Wolverton's will, and (to use untechnical language)
due to receive Queensbury House on the Newmarket estate, provided
the estate should pay the debts—I think that that was broadly the
A position—and who in fact for some years after her husband's death
continued to reside in the house, could nevertheless be said to be an
occupier under the Income Tax Act, 1918, Sched. A, anyhow until the
residue of her husband's estate had been ascertained. It is conceded—
it appears from the case—that she was there for many years before the
B residue of that estate was ascertained. When that happened, steps
could be taken to wind up the estate, get rid of the liabilities, and vest
the property in Lady Wolverton. The Crown, through the Attorney-
General, has disposed of any suggestion that, merely because the residue
of Lord Wolverton's estate had not been ascertained, therefore Lady
C Wolverton, by living in what had been her husband's house after his
death, could not be an occupier within the meaning of the Income Tax
Acts. It is conceded by counsel for the respondent, with his experience,
that, of course, it is possible that she could have been an occupier
within the meaning of those Acts. She might have been a tenant at
D will, no rent being reserved. She might have been granted a lease, or
at any rate a tenancy. She might have been there on leave and licence.
All that is accepted by counsel for the respondent. Nor does he make
anything of the leaseholds which were occupied in conjunction with the
house both before Lord Wolverton's death and by Lady Wolverton
E after he died, so that the point of law with which, apparently, the commissioners'
minds were filled in the course of the hearing is no longer
a point which needs to be discussed or resolved. There is a further
matter, however, and counsel for the respondent has put it very shortly
and clearly. He draws my attention to the findings of fact, all of
F which are contained in one paragraph of the case. It is evidence which
was given, and which the commissioners accepted

> [Lady Wolverton] lived at the house, known as Queensbury House, on the
> Newmarket estate at periods throughout the years in question [1932 to 1937],
> she employed and paid the servants and kept up the grounds. The executors
> never questioned her being there or tried to eject her. Estate duty interest and
> G legacy duty were assessed on July 20, 1937.

Thus, it appears that, so far as the facts are concerned, Lady Wolverton
did what many other widows have done when their husbands have died—
namely, lived on in the husband's house for some years intermittently,
employing and paying the servants, and keeping up the grounds. As
H far as the position she occupied there was concerned, I think that it
may be fairly put as being that neither she nor the executors bothered
about it at all. They did not question her being there, and they did
not try to eject her. That is to say, they did not ask her to go.

It is said that, amongst the arguments put forward on her behalf, apart from the fact that, until the residue of the estate had been ascertained, she could not be called an occupier, there was the argument that in fact, quite apart from any question of law, her occupation of the house during those years was not in her own right, and that she was occupying it as the representative of the executors of the will. I have not the least doubt, on the form of the case, that the ground for that suggestion was what had gone before—namely, that the residue of the estate had not been ascertained. It is now suggested that perhaps there were other reasons, and that perhaps there was some matter of fact upon which the commissioners could have found that. It has even been hazarded—it was indeed a hazard—that the executors said to Lady Wolverton, "It is always a good thing to have the house occupied. Continue there. Keep the house warm," (if I may use that vulgarism), and that it was in that way that she came to reside there. I am quite certain that, if anything of that kind ever occurred, these commissioners would have put it forward amongst the facts which they heard, and which they doubtless would have accepted. The fact that nothing of that kind appears in the facts indicates to me that nothing of the kind took place.

What is left, therefore, is only that a widow living on in her late husband's house, in the circumstances in which Lady Wolverton did, is, as a matter of law, the representative of the executors. It is conceded (because counsel for the respondent knows that he must concede it) that he cannot put that forward, and he is not, I suppose, going to involve himself in propositions of law which, if they are not going to succeed, may result in his client having to pay even more costs than she already has to pay. There is certainly no ground for suggesting that, if a widow continues to live in her late husband's house, she is on that account the representative of the executors of her husband's will. There is every reason in this case, as I say, to suppose that nothing was said. I have read the passage. The executors did not question her, and did not ask her to go. There is no ground in law, therefore, for suggesting that, merely because she went on living there, and no agreement or arrangement was made, she was in any sense the representative of the executors. It seems to me that, in those circumstances, I should only be adding needlessly to the costs of debating this question by asking the commissioners whether or not something happened when I am absolutely certain that it did not, or it would have already appeared in the case.

I find that the commissioners came to an erroneous conclusion in finding that the annual value of the Newmarket property must be excluded in computing the sur-tax payable by the respondent.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Waterhouse & Co.* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

COHEN *v.* COHEN.

[HOUSE OF LORDS (Viscount Caldecote, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Romer), **February 29, April 15, 1940.**]

A *Divorce—Desertion—Previous proceedings for divorce abandoned—Whether period of desertion continues to run—Matrimonial Causes Act,* 1937 (*c.* 57), *ss.* 2, 6 (3).

The petitioner sought a divorce, on the ground that her husband had deserted her for a period of at least 3 years immediately preceding the presentation of her petition, which was dated Mar. 2, 1938. The B husband had deserted the petitioner in 1925. On Mar. 31, 1930, the petitioner had presented a petition for divorce based on adultery, which petition was dismissed on May 4, 1937, on her application. She presented a further petition on May 25, 1937, also founded on adultery, which petition was dismissed on Mar. 1, 1938, on her application. Both these earlier petitions had been served on the respondent:—

HELD: (i) there was nothing connected with either petition which C had deterred the respondent from putting an end to the desertion, and in the circumstances of the present case, he had no reasonable cause for not trying to bring the desertion to an end, and the necessary period of desertion without cause was, therefore, uninterrupted.

(ii) the question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end, and the corresponding D question whether desertion without cause has existed for the necessary period, must always be questions of fact, and their determination must depend upon the circumstances of each particular case.

Stevenson v. *Stevenson* (1) *overruled.*

Order of Court of Appeal ([1939] 2 All E.R. 596) *reversed.*

[**EDITORIAL NOTE.** The filing of a petition for divorce has been regarded as E an act which necessarily causes the parties to live apart, and, it was argued, necessarily causes an interruption in a period of desertion which is running at the time of the presentation of the petition. This was the reason for the decision in *Stevenson* v. *Stevenson* (1). The House of Lords have been unable to find any support for that decision in any of the earlier authorities. Even after the filing of a petition, the Divorce Court would never discourage a friendly attempt at F reconciliation, for it exists, not for the purpose of promoting the dissolution of marriages, but for the purpose of dissolving marriages when all hope of reconciliation has come to an end. The House of Lords have found that there is no general principle applicable to all cases of desertion. Each case must be decided on its own particular facts, for it is clear that where one party brings wholly unfounded charges against the other, the latter could not be said to be deserting G without cause. Incidentally, they have expressed the view that the principle laid down in *Stevenson* v. *Stevenson* (1) has not received legislative recognition in the Matrimonial Causes Act, 1937, s. 6 (3). That subsection deals with an order of the court enforcing separation, and not with a petition upon which no order has been made.

AS TO EFFECT OF PETITION ON DESERTION, see HALSBURY, Hailsham Edn., H Vol. 10, pp. 658, 659, paras. 968, 969; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to:

(1) *Stevenson* v. *Stevenson*, [1911] P. 191; 27 Digest 320, *2986*; 80 L.J.P. 137; 105 L.T. 183.

(2) *Bowron* v. *Bowron*, [1925] P. 187; 27 Digest 561, *6168*; 94 L.J.P. 33; 132 L.T. 773.

(3) *Pratt* v. *Pratt*, [1939] A.C. 417; [1939] 3 All E.R. 437; Digest Supp.; 108 L.J.P. 97; 161 L.T. 49.

(4) *Kay* v. *Kay*, [1904] P. 382; 27 Digest 308, *2850*; 73 L.J.P. 108; 91 L.T. 360.

(5) *Harriman* v. *Harriman*, [1909] P. 123; 27 Digest 321, *2995*; 78 L.J.P. 62; 100 L.T. 557.

(6) *Lapington* v. *Lapington* (1888), 14 P.D. 21; 27 Digest 320, *2984*; 58 L.J.P. 26; 59 L.T. 608.

(7) *Wood* v. *Wood* (1887), 13 P.D. 22; 27 Digest 378, *3667*; 57 L.J.P. 48.

(8) *Kettlewell* v. *Kettlewell* (1880), 41 L.T. 737; 27 Digest 320, *2982*.

(9) *Marthews* v. *Marthews*, [1939] P. 97; [1938] 4 All E.R. 377; Digest Supp.; 108 L.J.P. 41; 160 L.T. 297.

(10) *Bush* v. *Bush*, [1939] P. 142; [1938] 4 All E.R. 598; Digest Supp.; 108 L.J.P. 46.

Appeal from a decision of the Court of Appeal (MacKinnon and Luxmoore, L.JJ., and Macnaghten, J.), dated May 2, 1939, and reported [1939] 2 All E.R. 596, affirming an order of Hodson, J., dated Jan. 18, 1939. The facts of the case are fully set out in the opinion of Lord Romer. The respondent did not enter any appearance to the petition. Having regard to the importance of the case, the House desired the assistance of the Attorney-General.

H. B. D. Grazebrook, K.C., and *J. E. N. Russell* for the appellant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *S. E. Karminski* for the Attorney-General.

Viscount Caldecote, L.C. [read by Viscount Maugham]: My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Romer, which entirely expresses my views on the matter, and I have nothing to add.

Viscount Maugham: My Lords, on my own behalf I wish to say that I too have had the advantage of reading the opinion which I have just mentioned, and, as I entirely agree with it, I too have nothing to add. I am requested to say that Lord Russell of Killowen also has had the advantage of reading the opinion prepared by my noble and learned friend Lord Romer, and that he entirely agrees with it.

Lord Wright: I also have had the same advantage, and, like the noble and learned Lords who have already spoken, I am fully in accord with the opinion which is about to be delivered by my noble and learned friend Lord Romer. I have nothing to add.

Lord Romer: My Lords, the appeal in this case raises a question of divorce law which is of considerable importance—of all the greater importance, perhaps, now that desertion is of itself a ground for divorce. The question is this. Where one of the spouses has committed the matrimonial offence of desertion, does that desertion necessarily come to an end by the presentation and service upon the deserting spouse of a petition by the other one asking for a dissolution of the marriage ?

The facts giving rise to that question in the present case are the following. The appellant, Dorothy Gertrude Cohen, was married to the respondent, Max Jaques Cohen, on Mar. 21, 1921, and a son, the only child of the marriage, was born in Apr., 1923. About two years after the birth of the child, the respondent deserted the appellant without cause, and since then has never himself taken any step, or indicated any intention or desire, to bring that desertion to an end. On Mar. 11, 1929, upon the application of the appellant, an order was made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, on the ground that the respondent had wilfully neglected to provide reasonable maintenance for the appellant and her child, that the respondent should pay a total sum of £1 per week for such maintenance, the custody of the child being given to the appellant. The order, however, contained no provision under sect. 5 (*a*) of the Act as to cohabitation. The sum of £1 per week was, upon the respondent's application, reduced to 12*s.* 6*d.* per week, by order dated Jan. 4, 1933. The respondent frequently made default in payment of these weekly sums, and, soon after the date of the last-mentioned order, he seems to have disappeared for a time, and ceased to make any payments towards the support of the appellant and her child. In the meantime—namely, on Mar. 31, 1930—the appellant presented a petition in the High Court for the dissolution of the marriage on the ground of the respondent's adultery. The petition was duly served upon the respondent, who put in an answer denying the adultery, but, owing, as the appellant says, to her want of means and the difficulty of serving the woman named in the petition, it was not further proceeded with, and, on May 4, 1937, it was dismissed upon the application of the appellant in the following circumstances. On Oct. 15, 1936, the appellant received from the respondent a letter, dated Oct. 2, 1936, which, so far as material, was in these terms :

> Dear Dorothy,
>
> As it is now so many years that we have lived together and now things have happened which for both our sakes has made same impossible, I hope you will agree that we both need our freedom to enable us to do the right thing for the future.
>
> So am enclosing the evidence you have been wanting for same.
>
> Yours,
> Max C.

Enclosed in the letter was a receipted hotel bill, which indicated that the respondent and a woman referred to in the bill as "Mrs. Cohen" had passed the night together at the hotel on July 25, 1936.

In consequence of the receipt of this letter and enclosure, the appellant obtained an order on May 4, 1937, dismissing the petition then on the file, and on May 25, 1937, she presented a fresh petition for dissolution of her marriage, on the ground of the respondent's adultery as evidenced by the hotel bill. The respondent was duly served with this petition,

but, in the light of subsequent information tending to show that no adultery had in fact been committed by him at the hotel, the appellant did not for the time being proceed further with it. On Jan. 1, 1938, there came into force the Matrimonial Causes Act, 1937, which by sect. 2 (*b*) made desertion without cause for a period of at least 3 years immediately preceding the presentation of the petition a ground for A
divorce. Accordingly, on Feb. 2, 1938, the appellant applied to the court for leave to file a supplemental petition on the ground of the respondent's desertion. This application was refused as being inconsistent with a practice note which directed that, in order to obtain relief under the new Act in such circumstances, a fresh petition must be filed. The B
petition dated May 25, 1937, was, accordingly, dismissed by an order dated Mar. 1, 1938, made upon the appellant's application, and on Mar. 2, 1938, she presented a fresh petition for the dissolution of her marriage, based solely on the ground of the respondent's desertion without cause for a period of at least 3 years immediately preceding its presenta- C
tion. This petition was duly served upon the respondent, but no appearance was entered on his behalf, and in due course it came on for hearing before HODSON, J., as an undefended cause. The judge was satisfied upon the evidence that the respondent had deserted the appellant without cause in 1925, and, but for the fact of the presentation D
and service of the two earlier petitions, he would have been prepared to hold that such desertion had continued without interruption up to Mar. 2, 1938. There was, however, the fact that between Mar. 31, 1930, and May 4, 1937, and between May 25, 1937, and Mar. 1, 1938, there were petitions on the file, both of which had been served upon the E
respondent, in which the appellant was asking for the dissolution of the marriage. In these circumstances, the judge felt, though with regret, that he was unable to hold that desertion without cause had subsisted for the 3 years immediately preceding Mar. 2, 1938, the date of the presentation of the petition then before him. He was, he said, pre- F
cluded—as, indeed, he was—from doing so by the decision of the Court of Appeal in *Stevenson* v. *Stevenson* (1). The petition was, therefore, dismissed, by order dated Jan. 18, 1939. The appellant then took the matter to the Court of Appeal, where it was heard on May 2, 1939, before MACKINNON and LUXMOORE, L.JJ., and MACNAGHTEN, J. The G
court held that it was impossible to distinguish the case from *Stevenson* v. *Stevenson* (1), and the appeal was dismissed, leave being given to appeal to your Lordships' House.

My Lords, from this narrative of the facts, it is abundantly clear that the respondent in 1925 committed the matrimonial offence of H
desertion, and that, from that date down to the filing of the present petition, he has shown no indication by word or deed of any intention or desire on his part to bring that desertion to an end.

In *Bowron* v. *Bowron* (2), where the intention of a husband to desert his wife had been established, it was said by SCRUTTON, L.J., that the intention is presumed to continue unless the husband proves genuine repentance and sincere and reasonable attempts to get his wife back. There were certainly no such attempts in the present case. However, as was said by Lord Macmillan in *Pratt* v. *Pratt* (3), at p. 420 ([1939] 3 All E.R., at p. 438), a case in which a wife had deserted her husband:

> In fulfilling its duty of determining whether on the evidence a case of desertion without cause has been proved the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion.

In the instances given by Lord Macmillan in this passage, it would have been unreasonable to expect the deserting spouse to make any attempts—or any further attempts, as the case might be—to put an end to the desertion. Other instances, as will presently appear, can be given of circumstances in which it would be unreasonable to expect the deserting spouse to make attempts to end the desertion. The deserting spouse is only bound, in the language of Scrutton, L.J., to make *reasonable* attempts. Had, then, the appellant in the present case done anything on her part to excuse the respondent from making any attempt to put an end to his desertion?

Before answering this question, it is necessary to consider in some detail the decision of the Court of Appeal in *Stevenson* v. *Stevenson* (1). In that case (decided under the Act of 1857), in July, 1910, a wife had presented a petition for judicial separation on the ground of her husband's adultery. In Jan., 1911, she presented a supplemental petition, alleging desertion by her husband in Dec., 1908, and praying for a dissolution of the marriage. The adultery was proved, and also the desertion. However, at the date of the original petition, 2 years had not elapsed since the original desertion, although they had done so at the date of the supplemental petition. Bargrave Deane, J., however, refused to make a decree *nisi* for dissolving the marriage, on the ground that the filing of the petition for a judicial separation had put an end to the desertion. The Court of Appeal consisting of Sir H. H. Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ., held that he was right in so refusing. After alluding to the fact that, at the date of the petition, the desertion had lasted only 18 months, Sir H. H. Cozens-Hardy, M.R., said, at p. 194:

> The presentation of the petition and its continuance on the files of the court prevented the subsequent desertion from being without excuse. She was praying the court to require her husband to keep away. When the supplemental petition was filed there had not been desertion for two years without excuse. Bargrave Deane, J.'s, judgment seems to me to be in strict accordance with the very careful judgment of Gorell Barnes, J., in *Kay* v. *Kay* (4) and with the judgment of the full Court of Appeal in *Harriman* v. *Harriman* (5). Butt, J.'s, decision in *Lapington* v. *Lapington* (6) is also a direct authority against the petitioner.

The two Lords Justices merely agreed, without giving any reasons of their own. It will be observed that Sir H. H. Cozens-Hardy, M.R., did not base his decision upon any facts peculiar to the case before him. He laid down a general principle applicable to all cases where the deserted spouse places upon the file a petition for judicial separation or divorce. The subsequent desertion cannot, he held, be treated as being without cause while the petition remains on the file. I shall consider the reason A which he gave for coming to this conclusion at a later stage in this judgment. For the moment, I merely propose to call attention to the singular fact that, of the three cases to which he referred as justifying his conclusion, the first two in no way establish, and the third seems to be inconsistent with there being, any such general principle as he was B laying down.

The facts in *Kay* v. *Kay* (4), so far as material for the present purpose, were these. In May, 1902, a wife filed her petition for divorce on the ground of her husband's adultery and cruelty. In Dec., 1903, she filed a supplemental petition, alleging desertion without reasonable C excuse for 2 years and upwards. At the trial of the cause before Gorell Barnes, J., the charges of cruelty and adultery were negatived by the jury. It was then contended on the wife's behalf that she was entitled to a decree of judicial separation by reason of the husband's desertion, which, she alleged, took place in July, 1900—that is to say, less than D 2 years before the original petition, but more than 2 years before the supplemental petition. In point of fact, the desertion in July, 1900, was not proved, but the judge went on to consider what would have been the result if it had been. He said, at p. 395:

> E It seems to me that if nothing has happened during the 2 years to entitle the wife to refuse to return to the husband, if he desires to put an end to the desertion, the petitioner, by filing a petition for divorce in the interval, and making and maintaining throughout charges which are in fact unfounded—and by that I mean charges which it is shewn give her on the real facts of the case no right to say to him, "I will not have you back if you offer to return"; and then, as an incident in those proceedings, obtains an order for alimony and enforces it—that, I think, puts it out of the power of the respondent to do anything, and it seems to me it is F a position in which, by her own act, the petitioner is showing that she is no longer —no matter what his attitude is—ready to receive him back, and can, I think, no longer be held entitled to treat him as continuing to desert her.

This is very far from laying down any such general principle as was enunciated by Sir H. H. Cozens-Hardy, M.R., in *Stevenson* v. *Stevenson* (1). In deciding the question whether or not the petition G by the deserted wife in that case put an end to the desertion, Gorell Barnes, J., took into consideration (i) the conduct of the deserting husband, (ii) the fact that the wife in the petition made unfounded charges against her husband—charges which the judge stigmatised as having "no reasonable basis," "no reasonable prospect of success," H and as charges "unfounded in their character" which had been "flung" against him—and (iii) the fact that she actively maintained the petition by obtaining and enforcing orders for alimony. After the filing of the petition in that case, the husband could not reasonably have been expected to take steps to end the desertion. Nor had the husband's conduct been such as to entitle the wife to refuse to return to him had he desired to put an end to the desertion, and the conduct of the husband is always a material consideration in such cases. If, for example, he is living in adultery with another woman as his wife, it would be absurd to think that it is the petition of the wife which is responsible for the continuance of his desertion.

Harriman v. *Harriman* (5) was a decision of the full Court of Appeal given in these circumstances. A husband deserted his wife in July, 1905. In Mar., 1906, the wife obtained an order under the Summary Jurisdiction (Married Women) Act, 1895, s. 5, that her husband should pay a weekly sum for her support, but the order contained a provision under sect. 5 (*a*) of that Act that the wife should no longer be bound to cohabit with her husband, and this provision, by virtue of the subsection, had the effect of a decree of judicial separation. In Dec., 1907, the wife presented a petition for dissolution of the marriage on the grounds of the husband's adultery and desertion for 2 years without reasonable excuse. It was held that the effect of the non-cohabitation clause was to prevent the continuance of the desertion after the date of the order. There had been a decree, or what was equivalent to a decree, of the court, in the face of which it was out of the question that the husband should make any attempt to return to the matrimonial domicil. The case is no authority whatsoever for the proposition that the mere filing and service of a petition for divorce or judicial separation have of themselves the same effect.

In *Lapington* v. *Lapington* (6), a husband deserted his wife in June, 1886. In Aug., 1886, the wife presented a petition for dissolution of her marriage, on the ground of the husband's adultery and cruelty. In July, 1888, she obtained leave to amend her petition by alleging in addition a charge of his desertion without reasonable cause for 2 years and upwards. At the hearing, the petitioner abandoned the charge of cruelty and relied only upon the adultery and desertion. Butt, J., refused to make a decree, but solely upon the grounds that, at the date of the petition, the desertion had not continued for the necessary 2 years, and that the difficulty was not got over by amending the petition. He said, at pp. 21, 22:

> The cause of action did not exist when the suit was commenced. At common law if a man issues a writ before the credit has expired he cannot obtain judgment on that writ by a simple amendment. . . I am ready to grant you now a judicial separation on the ground of adultery, which will not prevent further action on your part to turn it into a decree *nisi* for dissolution on the ground of desertion, but it must be by a fresh suit.

How this can be regarded as an authority for saying that the desertion was put an end to by the filing of the petition and would cease to exist while the petition remained on the file passes my comprehension. It is true that Butt, J., did not say in terms that the desertion had not been put to an end by the filing of the petition, but it is clear that he must have thought that it had not, for the decree of judicial separation which he was ready to grant would necessarily bring the desertion to an end, in accordance with the decision in *Harriman* v. *Harriman* (5). The strong impression left on my mind by this case is that what I may call the *Stevenson* principle (1) was unknown to Butt, J. It would also appear to have been unknown to so great an authority upon the subject as Sir James Hannen, P. In *Wood* v. *Wood* (7), the relevant facts were (i) a petition by a wife in Feb., 1886, praying for dissolution of the marriage on the ground of adultery and desertion since Jan., 1884, (ii) the hearing of the petition in June, 1886, when it was adjourned, desertion for 2 years not having been shown, but only a desertion beginning in Oct., 1884, (iii) a supplemental petition filed in Aug., 1887, alleging desertion since Oct., 1884, and (iv) a decree *nisi* for dissolution pronounced by Sir James Hannen, P., in Dec., 1887. It will be observed that, although during the whole period from Feb., 1886, to Dec., 1887, the wife's petition was on the file, Sir James Hannen, P., treated the desertion as continuing. In *Kettlewell* v. *Kettlewell* (8), a wife petitioned for dissolution of her marriage on the ground of her husband's adultery and cruelty. He had also deserted her, but the 2 years had not elapsed at the date of the petition. At the hearing of the petition, the charge of cruelty was not proved, but, 2 years having at that time elapsed since the original desertion, Sir James Hannen, P., gave the wife leave to amend her petition by alleging desertion for 2 years. Whether or not a decree for dissolution was then made does not appear from the report, though presumably one was in fact pronounced. In any case, Sir James Hannen, P., would not have given leave to make such an amendment if the presentation and service of the petition had brought the desertion to an end.

My Lords, it is unnecessary to trouble your Lordships with decisions pronounced since *Stevenson* v. *Stevenson* (1) was decided, because that case was undoubtedly binding upon all tribunals other than this House. I must, however, make an exception in the case of the recent decision of Langton, J., in *Marthews* v. *Marthews* (9), for Langton, J., expressed the view in that case that the principle laid down in *Stevenson* v. *Stevenson* (1) had received legislative recognition in the Matrimonial Causes Act, 1937, s. 6 (3). With all respect to Langton, J., I am unable to take this view. The subsection is in these terms:

> For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Acts having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

The subsection is dealing with a case where a decree of judicial separation, or an order having the same effect, has actually been made, and not with a case where a petition has been filed without any order having been made upon it. The subsection would, therefore, appear to have been directed to avoiding the difficulty occasioned by the decision in *Harriman* v. *Harriman* (5), which was unquestionably rightly decided. I can draw no inference in favour of *Stevenson* v. *Stevenson* (1) from the fact that the subsection does not deal with the difficulty which has been created by that case. Nor have I been able to find any support for that decision in any of the earlier authorities. I did not, indeed, expect to do so, for, with all respect to the eminent judges who were parties A to the decision, I cannot agree that, when a wife presents a petition for divorce or judicial separation, she is "praying the court to require her husband to keep away," if that be meant, as SIR H. H. COZENS-HARDY, M.R., intended it to be meant, to refer to the period between the filing and the hearing of the petition. Nevertheless, that was the B ground upon which the decision was based. There may be cases—*Kay* v. *Kay* (4) was one of them—where the petition contains gross charges against the husband so reckless and so unfounded that he cannot reasonably be expected to make any attempt to bring his desertion to an end. In a case such as the present, however, I can see no reason C at all why the husband should be treated as being absolved from his duty to make any such attempt by the presentation and service of the petition. He must not, of course, try to "force himself into the matrimonial home," to use the words of SIR BOYD MERRIMAN, P., in *Bush* v. *Bush* (10), at p. 144 ([1938] 4 All E.R., at p. 600). Any such D molestation would very properly be punished by the court. The court, however, would never discourage a friendly attempt at reconciliation on the husband's part, as, for example, by letter. It would, on the contrary, be only too ready to encourage any such attempt. The Divorce Court does not exist for the purpose of promoting the dissolution E of marriages, but for the purpose of discharging the painful duty of dissolving them when all reasonable hope of reconciliation between the parties has come to an end.

My Lords, in my opinion, in laying down a general principle applicable to all cases in which a deserted spouse presents a petition for divorce F or judicial separation, the decision in *Stevenson* v. *Stevenson* (1) was wrong, and should be overruled. The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end, and the corresponding question whether desertion without cause has existed for the necessary period, must always be questions of fact, G and the determination must depend upon the circumstances of the particular case. I deprecate attempts to lay down any general principle applicable to them all.

It only remains to consider whether, in the case now before your Lordships, the respondent can be said to have had any reasonable H excuse for making no attempt to put an end to his desertion of the appellant. For this purpose, it is only necessary to consider the filing and service upon him of the two earlier petitions. No one has suggested, or could suggest on the facts that I have stated, that he could have had any other excuse. It is true that the first petition, which was filed on Apr. 14, 1930, charged the respondent with adultery. It was never proceeded with, and the charge has never been proved. However, it was never disproved, and there is nothing in the history of this case which even remotely suggests that the petition, while it was on the file, deterred the respondent in the very least from taking steps to end his desertion. Beyond serving the respondent, nothing was done by the appellant under the petition, and it remained neglected on the file until it was dismissed on May 4, 1937. In the meantime, the appellant had been making more or less fruitless attempts to make the respondent pay the 20*s*. per week for the maintenance of herself and her child which had been ordered by the court of summary jurisdiction, and the respondent had successfully applied to that court for an order reducing the allowance to 12*s*. 6*d*. per week. He paid this sum for a short time, but then disappeared, and made no further payments. His next appearance on the scene was when he wrote to his wife the letter of Oct. 2, 1936, enclosing the hotel bill as evidence—though apparently untrue evidence—of his adultery. Thereupon, having got the first petition dismissed, she filed and served the second. No further proceedings were taken under it, and on Mar. 1, 1938, it was dismissed, for the reasons I have mentioned in an earlier part of this judgment. It is abundantly plain that there was nothing connected with this second petition which could in any way have induced the respondent to refrain from putting an end to his desertion, had he had the slightest desire to do so.

My Lords, in my opinion, the desertion by the respondent without cause, which began in 1925, continued to be desertion without cause uninterruptedly down to the filing of the present petition in Mar., 1938. Therefore, for the reasons that I have given, I would allow the appeal. The order of Hodson, J., of Jan. 18, 1939, and that of the Court of Appeal of May 2, 1939, should be discharged, and the case should be remitted to the Probate, Divorce and Admiralty Division to make a decree *nisi* for the dissolution of the marriage between the appellant and the respondent.

Appeal allowed. Case remitted to Probate, Divorce & Admiralty Division to grant decree nisi.

Solicitors: *Percy Bono & Griffith* (for the appellant); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

BARKING BOROUGH RATING AUTHORITY *v.* CENTRAL ELECTRICITY BOARD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Hilbery, JJ.), **January 11, 12, 15, April 2, 1940.**]

Rates and Rating—Basis of assessment—Electricity undertaking—Limiting profits basis to accounts for year preceding date of assessment—Whether "special circumstances" rendering profits basis inapplicable—Rating and Valuation Act, 1925 (*c.* 90), *s.* 31 (5).

The hereditament occupied by the respondents in the area of the appellants, consisting of pilot wires of an electricity substation or transformer station and certain transmission towers and lines, was assessed in the appellants' valuation list at a rateable value of £1,244, and on May 26, 1934, the respondents by a proposal objected to the assessment on the ground that it was excessive and unfair. On Jan. 18, 1935, the appellants made a proposal to amend the list by increasing the assessment to £8,436, and the respondents duly objected thereto. The proposals and the objection were heard by the local assessment committee on Oct. 19, 1936, and Mar. 15, 1937, when they decided to amend the list by increasing the assessment to £2,100, which increase was affirmed on appeal to quarter sessions by the appellants, who then appealed against the decision of quarter sessions. At the hearing before quarter sessions, evidence relating to the estimates and the accounts of the respondents subsequent to 1934 was excluded as irrelevant. The appellants contended that there was no justification in law for limiting the profits basis to the accounts for the year preceding the date of the assessment, and that there were "special circumstances" existing as at Apr. 1, 1934, which in law made the profits basis inapplicable, or required it to be modified. The respondents contended that the statutory hypothetical tenant from year to year was not a tenant for a term certain, and in particular not a tenant for a term of 10 years, that the evidence was thus rightly excluded as irrelevant, and that there were no special circumstances rendering the profits basis inapplicable:—

HELD: (i) there were no special circumstances which rendered the profits basis inapplicable.

(ii) evidence relating to the accounts subsequent to 1934 was rightly excluded as irrelevant.

(iii) as the estimates subsequent to 1934 were private documents of the respondents, they could not be forced to produce them and to put them in evidence.

[**EDITORIAL NOTE.** The rateable value is usually based upon the rent, but, in the case of public utility undertakings, the actual profits made upon the property to be valued have long been taken as a basis upon which to calculate the rateable value. The present case is mainly concerned with the period over which the inquiry concerning profits shall extend and the extent to which the assessment authority can call for the production of estimates of the profits of the undertaking. The property to be assessed in the present case presented a peculiar difficulty in that a large part of the receipts of the undertaking arose from the sale of electricity to other undertakers, who had generated it.

AS TO ASSESSMENT ON PROFITS BASIS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 390, 391, para. 824; and FOR CASES, see DIGEST, Vol. 38, pp. 480-493, Nos. 386-484.]

Cases referred to:

(1) *Kingston Union* v. *Metropolitan Water Board,* [1926] A.C. 331; 38 Digest 547, *901*; 95 L.J.K.B. 605; 134 L.T. 483; *affg.* S.C. *sub nom. Metropolitan Water Board* v. *Kingston Union Assessment Committee,* [1925] 2 K.B. 509.

(2) *St. James' & Pall Mall Electric Light Co., Ltd.* v. *Westminster Assessment Committee,* [1934] A.C. 33 ; Digest Supp. ; 103 L.J.K.B. 9 ; 150 L.T. 123.

(3) *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee,* [1901] A.C. 175 ; 38 Digest 526, *735* ; 70 L.J.K.B. 584 ; 84 L.T. 542.

(4) *Great Central Ry. Co.* v. *Banbury Union, Sheffield Union* v. *Great Central Ry. Co.,* [1909] A.C. 78 ; 38 Digest 543, *875* ; 78 L.J.K.B. 225 ; 100 L.T. 89 ; *revsg.,* [1907] 1 K.B. 717, and [1908] 1 K.B. 750. A

(5) *R.* v. *London, Brighton & South Coast Ry. Co.* (1851), 15 Q.B. 313 ; 38 Digest 518, *695* ; 20 L.J.M.C. 124 ; 16 L.T.O.S. 533.

Appeal by way of case stated from a decision of the court of quarter sessions for the county of Essex. At the hearing before quarter sessions, the following facts were proved or admitted : B

The respondents do not generate electricity, though in certain circumstances they would have the power to do so. The generation of the electricity purchased by the respondents is for the most part concentrated at certain selected stations, which are operated under the control of the respondents, and the whole output of which is purchased by the respondents. Subject to the right of the respondents to sell energy to railway companies, all the energy purchased by the respondents is sold by them in bulk to other authorised undertakers, who in turn sell it either to C yet other authorised undertakers or to consumers. The owner of a selected station may also be an authorised undertaker. He sells his whole output of energy to the respondents and buys back so much as he requires for his own distribution at a statutory price. So much of the energy produced at that station as is re-purchased by the owner does not pass on the grid. The selected stations are so linked up by the grid that the amount of spare generating plant for use in emergencies and at peak working can be kept at a minimum for the country as a whole. For the purpose of D the respondents' undertaking, the country is for the present divided into 9 areas, including 2 areas in Scotland. The hereditament in question is included in the area known as South-East England. The grid was not completed in all areas at the same time. The expression "general trading" is used when a tariff under the Electricity (Supply) Act, 1926, s. 11, fixed by the respondents and approved by the electricity commissioners has come into operation in any area. Prior to such tariff being fixed, the respondents' trading in the area was known as "preliminary trading." By the Electricity (Supply) Act, 1926, s. 11, the tariff to be charged by E the respondents (being the sale price of electricity sold by the respondents to authorised undertakers other than authorised undertakers who own selected stations, and who may under the Electricity (Supply) Act, 1926, ss. 7, 13, be entitled to purchase their requirements of electricity from the respondents at a special price) has to be fixed so that, over a term of years to be approved by the electricity commissioners, the receipts on income account of the respondents shall be sufficient to cover their expenditure on income account, with such margin as the electricity F commissioners may allow. The term of years fixed by the respondents in respect of the first tariff period, and approved by the electricity commissioners under the Electricity (Supply) Act, 1926, s. 11, was generally 10 years. In the case of some areas, a shorter term was fixed. The termination of the tariff periods did not in all cases synchronise. The respondents cannot require a supply of electricity to be purchased from them by any authorised undertaker other than the owner of a selected station, except under the Electricity (Supply) Act, 1926, ss. 10, 14. A percentage of 89.8 per cent. of the total sales of electricity by the Board in 1934 G was to the owners of selected stations. Of these sales, 14.5 per cent. were at tariff prices and 75.3 per cent. were at a price agreed on the principles set out in the Electricity (Supply) Act, 1926, s. 13. Any increase in the tariff rate would increase the number of owners of selected stations who would be in a position to demand a supply on the terms set out in the Electricity (Supply) Act, 1926, s. 13. The initial construction of the grid was completed early in 1934, but the grid had only come into use up to a fraction of its capacity. During 1933, general trading H was being carried on in 2 areas only. General trading commenced in the South-East and East England areas and in one other area on Jan. 1, 1934, and in a sixth area on Apr. 1, 1934. By 1937, general trading was being carried on in 8 areas. In 1933, two valuers appointed by the central valuation committee and the respondents respectively recommended that, for the purposes of the second valuation list under the Rating and Valuation Act, 1925, and subject to reconsideration when the grid came into full or fuller operation, the respondents' transmission lines should be assessed at certain values per mile, according to voltage and circuits. The central valuation committee advised all rating and assessment authorities to give effect to that recommendation, and proposed that the position should be examined afresh early in 1936. No recommendation was made with regard to transformer stations. The cost of a double-circuit 132,000-volt line, with towers, but without allowing for land, was 27*s.* per yard. Five per cent. on that figure equalled 1*s.* 4¼*d.* per yard, and the figure adopted by the appellants for the purpose of their valuation hereinafter referred to was 1*s.* 3*d.* per yard. Figures similarly calculated were used by the appellants for the purpose of valuing the other transmission lines. At the hearing before the assessment committee, the respondents contended that, on an application of the profits basis, the rateable value of the hereditament in question was nil, but they offered to accept an assessment of £2,100, which was based on a valuation of the transmission lines according to the recommendation of the central valuation committee amounting to £173, and on a valuation of the said transformer station at 1 per cent. on a capital cost of £164,570 plus the ground rent of £125—that is, £1,770. The valuation of £173 gives an average net annual value for the lines, towers and land of about 2*d.* per yard. For wayleaves for the transmission towers in the appellants' area the respondents pay £445 annually. In addition, the lands in which certain towers in the area are placed have been purchased by the respondents at a cost which is equivalent to an annual payment of £55. The assessment of the respondents' undertaking for the year commencing Apr. 1, 1934, if calculated by the application of the profits basis to the respondents' actual accounts for 1933 or 1934, would be nil. There had been prepared by the electricity commissioners and published by His Majesty's Stationery Office during 1927 to 1931 electricity schemes for each of the 9 areas. Among other estimates prepared by the electricity commissioners and published with the schemes were: "Estimated expenses of central electricity board (other than costs of generation) and unit charge necessary to meet such expenses." The estimates were made by the commissioners for a varying number of years, year by year. These estimates were put forward by the electricity commissioners as illustrations of a manner in which the schemes as prepared by them might be operated. The schemes as adopted by the respondents varied from the schemes for each of the 9 areas, particularly in relation to the number of selected stations. General trading commenced in each area two to three years later than was expected by the electricity commissioners. Before obtaining the approval of the electricity commissioners in respect of each of the tariffs fixed by them under the Electricity (Supply) Act, 1926, s. 11, the respondents prepared estimates of their receipts and expenditure in each of the years included in the period proposed by them to be fixed as the tariff period. The estimates made by the respondents were based on tariffs which they were satisfied complied with the provisions of the Electricity (Supply) Act, 1926. That is to say, over the term of years fixed by the respondents and approved by the electricity commissioners, the receipts on income account should be sufficient to cover the expenditure on income account, with such margin as the electricity commissioners may allow. The estimates made by the respondents were never made public, and, except for 1933 and 1934, in so far as they related to areas then engaged in general trading, they were not produced in evidence. The account for 1933 for those areas in which general trading had commenced showed a surplus of revenue over expenditure of about £6,500, as against a deficiency of £244,000 estimated by the respondents for that year as the first year of a 10-year period. The comparable figures disclosed by the 1934 account and the estimate for 1934 were a surplus of about £96,000 against an estimated deficiency of £119,000. During the various tariff periods, the hereditaments occupied by the respondents would vary from time to time. The average rate of interest payable by the respondents on borrowed capital during 1933 and 1934 was 5.375 per cent. The capital expenditure up to 1934 on that part of the respondents' undertaking in which general trading had commenced was £19,554,107, and a total rateable value by taking 5 per cent. on that figure would be £977,705. If the respondents had paid rates on that rateable value during 1934, the payment for rates at an average of 11*s.* in the £ would have been £537,738. During that year, the actual net interest charge on all money borrowed by the respondents other than money borrowed for the purpose of standardising frequencies amounted to £1,285,721. This charge was capitalised by the respondents under the powers conferred by the Electricity (Supply) Act, 1926, s. 27 (2) (*b*), and was not charged to revenue, which in fact amounted only to £96,000.

The case stated the evidence as follows:

At the hearing before quarter sessions, the appellants asked for the respondents' estimates made prior to Apr. 1, 1934, for each area for each year up to 1939 to be produced, but, on a submission by the respondents, quarter sessions ruled that estimates other than those for 1933 and 1934 in respect of the areas which were actually engaged in general trading in those years were inadmissible. On a submission by the respondents, quarter sessions also ruled that the published accounts for any year after 1934 were also inadmissible, although at an earlier stage extracts from the respondents' published accounts for 1935 to 1937 inclusive had already been put in evidence by the appellants without any specific objection at the time by the respondents, but, in cross-examination of appellants' witness who produced them, counsel for the respondents refused to treat these accounts as in any way relevant. The appellants produced a valuation based on the published estimates of the electricity commissioners, together with the appellants' own estimates for the year 1941-1942 in respect of the 4 areas for which the electricity commissioners had not made an estimate, which showed that over a period of 10 years from 1932-1933 to 1941-1942 a sum of money might be earned which would be sufficient to justify a rateable value of 4.24 per cent. on capital expenditure if the whole of that period were looked at. For the reason that general trading commenced two to three years after the date expected by the electricity commissioners, the appellants submitted that 4.24 per cent. was an underestimate, and that 5 per cent. would be justified. In support of their valuation, the appellants produced a comparison of the electricity commissioners' estimates for 1933 to 1937 with the actual results achieved by the respondents, as disclosed by their published accounts. The appellants further relied on the fact that, in so far as the respondents did not pay rent for their undertaking, they were paying sums by way of interest which amounted to not less than 5 per cent. on the capital expended on the undertaking.

Sydney G. Turner, K.C. (for *A. M. Trustram Eve, K.C.*, on war service) and *J. Scott Henderson* for the appellants.

W. Craig Henderson, K.C., and *C. Erskine Simes* for the respondents.

Hilbery, J. [delivering the judgment of the court]: This appeal by way of case stated raises two questions. To adopt the words of counsel for the appellants, the substantial question is whether the court of quarter sessions was right in law in holding itself bound to arrive at the rateable value of the hereditaments in question on what is known and recognised as "the profits basis." It was laid down by the House of Lords in *Kingston Union* v. *Metropolitan Water Board* (1), that, in the case of a water company or other body supplying water in a number of different parishes and possessed in those parishes of reservoirs, mains and other property necessary for the purposes of the undertaking, the rateable value of the hereditaments of the undertaking in any particular parish should be ascertained on the profits basis. To that rule of general application where such undertakings were concerned Viscount Cave, L.C., added this proviso, at p. 345:

> . . . I do not mean that in no case can another method be adopted by a rating authority in assessing waterworks for rating purposes; but in order to justify that course it would be necessary that the authority should be satisfied that there are special circumstances in the case sufficient to make it necessary for them to exclude the recognized formula of assessment and to resort to some other principle . . .

The word "necessary" in that context, it is not disputed, means necessary in order to assess the rateable value of the hereditaments in question in any particular case. It was conceded by counsel for the appellants that that decision would be applicable to the respondents' undertaking, and that the profits basis would be the right method to apply were it not that the facts disclosed, as the appellants contended, special circumstances sufficient to make it necessary to exclude this recognised formula of assessment.

Before I deal with what were said to be the special circumstances making it necessary to exclude the profits basis, it is worthy of note that neither the assessment committee nor the court of quarter sessions felt any difficulty in applying the recognised method to the facts of this case. It must be essentially a matter for the body which has the duty of making
A the assessment to say whether it finds in the facts circumstances which make it necessary to depart from the recognised formula and to employ another.

A question of law for this court might well be said to arise if the assessment committee misdirected itself by refusing to apply the recognised
B formula without regard to the question whether or not there were special circumstances compelling resort to another method, since it is now the law that an undertaking of the nature dealt with in *Kingston Union* v. *Metropolitan Water Board* (1) must be rated in all the parishes where it has rateable hereditaments according to this recognised formula. If,
C however, as here, the assessment committee and quarter sessions, rightly applying the law, decide the rateable assessment by the recognised formula, there is no law which decides what shall or shall not be special circumstances making it necessary for them to adopt another method. If those tribunals examine the facts and decide the question whether or
D not the facts compel them to depart from the formula which the law says they must employ, their decision on that question is one of fact, and not one of law. That the *Kingston* case (1) went through all the courts was due to the fact that the decision of the justices had been given as a decision of law. In that case, it was pointed out by VISCOUNT CAVE,
E L.C., that it was evident that the justices were of opinion that in law the profits basis was inapplicable to such an undertaking as was there in question, since it was carried on in performance of a statutory duty, and not for profit. VISCOUNT CAVE, L.C., said, at p. 341 :

> It would have been difficult for them to indicate more clearly that the question
> F which they intended to submit was one of rating law and not of fact . . .

That, of course, is wholly different from a case like the present. Here the case as stated shows that the justices did what the law required them to do—namely, took the profits basis formula as *prima facie* applicable—and then correctly directed themselves to inquire whether there were
G circumstances which made it necessary for them to resort to some other method. Once they had thus directed themselves, they were the tribunal to decide whether in fact they were compelled to adopt another method than the profits basis. In the language of VISCOUNT CAVE, L.C., already quoted, they were that rating authority which had to be satisfied that
H there were special circumstances making it necessary to depart from the recognised formula. It would be strange if this court had the duty of deciding as a matter of law what circumstances in the case under consideration ought to have made the assessment committee and quarter sessions feel and find that they were unable to employ the recognised formula.

The first point taken by the respondents—namely, that what is said to be the substantial question is not a question of law, but is one of fact—appears to us, therefore, to be right. In view, however, of the argument which was presented, it is desirable to state our views on the appellants' contention that, in the facts of the case, there were special circumstances making it necessary that the assessment committee should not apply the profits basis formula. The special circumstances which, according to the appellants, the committee of assessment and quarter sessions ought to have decided made it necessary for them to depart from the recognised formula are set out in para. 14 of the special case. The first is stated in the case in these terms, in para. 14 (1):

> That by law the respondents had so to fix their tariff that over a period of years the revenue receipts would be sufficient to cover the revenue expenditure including interest and sinking fund charges together with such margin as the electricity commissioners might allow.

To that it may be answered that the Metropolitan Water Board, who were the parties to, and the subject of, the *Kingston* case (1), have to do the same thing. True it is that the water board is required to do it each year and the respondents may do it over a period of years approved by the commissioners, and the commissioners have approved their doing it over a period of 10 years, but that is fortuitous. If the assessment committee looks at accounts covering the latest period antecedent to the making of the rate, it may be easier to use them if they are balanced yearly than if they are only a part of accounts intended to be balanced over an incompleted period of 10 years. The difference between using the one set of accounts and the other, however, is a question of convenience, and not of principle.

The second alleged special circumstance is said to be this:

> That by law the respondents were enabled to budget for revenue deficits in the earlier years of the tariff period by being given power to pay interest out of capital and to suspend the sinking funds, such revenue deficits to be made good by surpluses to be derived from the larger volume of business in the later years of the tariff period, and that such revenue deficits have in fact been incurred.

That provision is not new in legislation affecting statutory bodies with particular functions to perform but belonging to the same genus as that of the respondents. Our attention was called to the Port of London (Consolidation) Act, 1920, ss. 104, 105, which enable that authority to suspend for 10 years payments to the sinking funds which they are bound to provide to redeem or repay stock or money borrowed and redeemable or repayable in 90 years, and give power to charge to capital interest on moneys laid out on constructional work from which revenue may be derived after its completion. Other examples of the same thing were given to us, such as the Grampian Electricity Supply Act, 1922, ss. 88, 89, and the Electricity Supply Act, 1922, s. 1, of which the Electricity (Supply) Act, 1926, s. 27, is merely a repetition. Local authorities who own electricity undertakings—and there are many such all over the country—have similar powers under the Local Government Act, 1933, s. 198. No case was cited to us where such undertakings as are carried on under, or pursuant to, the provisions of these various Acts were rated upon any formula other than that of the profits basis, nor was the statement that all such undertakings were in fact rated upon that basis challenged by counsel for the appellants. Furthermore, it was pointed out by LORD ATKIN in *St. James' & Pall Mall Electric Light Co.,* A *Ltd.* v. *Westminster Assessment Committee* (2), at p. 42 :

> ... the amount of the landlord's or tenant's share of the fund does not depend upon the use to which they put their shares when received, whether voluntarily or under statutory obligation. It is well established, for instance, that sinking funds to satisfy capital obligations whether imposed by statute or not are not permissible deductions in calculating the fund to be divided.

B For rating valuation, therefore, payment or suspension of payments to the sinking fund is irrelevant. Again, whether or not interest is capitalised or paid can make no difference for rating purposes, since interest payments are not deductible in arriving at gross rateable value. C Such payments are an allocation out of profits made by the landlord, and are a landlord's charge. They are no part of the measure of annual value which the assessing body is seeking to ascertain. As was said by LORD DAVEY in *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee* (3), at p. 186 :

> D ... it is perfectly immaterial what becomes of the amount which is the result of carrying on the business on the hereditament after paying the expenses and other outgoings. It is immaterial whether it is applied for public uses, or the payment of debt and other charges as in the present case, or whether it goes into the pockets of the occupiers. What you have to look at is this : Is the occupation " beneficial " in the sense in which the term is used in that passage ?

E The interest which a landlord may be called upon to pay upon the capital expended on the erection of the hereditament in question cannot be a measure of the rent which the hypothetical tenant would be ready to pay for his occupation of the hereditament, nor could it be a matter which the hypothetical tenant could be supposed to take into consideration in calculating what rent he could pay. In *Great Central Ry. Co.* v. F *Banbury Union* (4), LORD LOREBURN, L.C., said, at p. 87 :

> The real objection is that cost is not a measure of rent. Many houses constructed at enormous expense notoriously fetch very moderate rents.

In these circumstances, it is impossible to say that the second alleged G special circumstance is such as could make it necessary or proper to depart from the profits basis.

The third, fourth and fifth special circumstances were as follows :

> (3) That the accounts for 1933 had little relation to the undertaking which had to be valued at Apr. 1, 1934, since at the latter date 5 areas were in general trading whilst in 1933 only 2 areas were engaged in general trading. (4) That the accounts H for 1933 do not comprise receipts (other than preliminary trading receipts) earned in the area in which the said hereditament is situated. (5) That the grid was not completed until early in 1934 and that the undertaking which had to be valued as at Apr. 1, 1934, was different in size, quality and user from that which earned the receipts shown by the 1933 accounts.

These facts, however, did not make the application of the profits basis impossible. The rating authority dealt with all the facts available to them down to the date when the rate was made—namely, Apr. 1, 1934. Accounts are only one form of material for consideration. The accounts for 1933 were the latest accounts available to them giving actual figures in relation to such trading as there had been. There is nothing in the case, however, to show that the authority did not take into consideration all such facts as could be ascertained down to the latest time A antecedent to the date when they were making the rate. An authority such as the respondents, or any other large electricity undertaking, obviously cannot create the whole of its system at once, and will necessarily be coming into actual trading progressively, in new districts and parishes. In this connection, it must be remembered that a rate, B once made, is not final. A fresh proposal can be made at any time under the Rating and Valuation Act, 1925, s. 37 (10).

The sixth alleged special circumstance has only to be read to be recognised as argument, and not as a fact or circumstance. It is stated as follows: C

> . That notwithstanding the results of the said accounts a tenant of the undertaking on the basis of the definition of net annual value contained in the Rating and Valuation Act, 1925, s. 22 (1) (*b*), would be prepared to pay a rent for the said undertaking.

The seventh and last alleged special circumstance is said to be this: D

> That a large part of the gross receipts of the undertaking are receipts for electricity which the respondents sell immediately to the undertakers who generate it, thus making the accounts of the undertaking of an unusual character, the gross receipts being artificially inflated, which materially affects the calculation usually made on the profits basis to arrive at tenant's share.

The transaction alluded to does not artificially inflate the respondents' E gross receipts. It is a transaction which the respondents actually have to enter into in order to conduct the business which they are by statute created to conduct. They are obliged by statute to make the purchase and sale here referred to. The amount bought back from the respondents may be less than they buy or it may be the same. When F sold back to undertakers who generate, it is sold back at the respondents' statutory price, subject to certain rights reserved by the statute. The transactions alluded to are, therefore, real transactions, forming a necessary part of the respondents' business. Moreover, if it inflates gross receipts, as it is said it does, that does not make it necessary to G abandon the profits basis. That circumstance can be taken into account by the assessment committee like any other special feature in accounts which they have to consider when arriving at the rateable value and considering the tenant's share. In dealing with the tenant's share, they are not bound to take gross receipts, and the percentage H which they decide upon is entirely a matter for them. In our view, therefore, there were no special circumstances making it necessary to apply some formula other than that which is known as the profits basis.

The other question for the opinion of the court is whether or not evidence relating to the estimates and accounts of the respondents subsequent to 1934 was rightly excluded. With regard to accounts, the assessment committee and quarter sessions looked at the 1933 accounts. The rate had to be made on Apr. 1, 1934. Those accounts were taken into consideration because they represented facts. They contained statements of fact known at the time when the rateable value was being A fixed.

In *R.* v. *London, Brighton & South Coast Ry. Co.* (5), COLERIDGE, J., said, at p. 367:

> The only remaining point in this case turns upon the narrow question, from what date the overseers ought to make their calculations as to the assessment on the B company.

This was a railway company in which there had been brought into action an additional mileage of track. Then COLERIDGE, J., continues as follows, at pp. 367, 368:

> C The date of the rate is Nov. 20, 1847; and, as regards the company, it is based on a half-yearly statement published by them on Aug. 10, but made up only to the June 30 preceding. In the interval between June 30 and Nov. 20, the value of the working plant of the company had been, as the sessions have found, not improperly, increased from £260,000 to £350,000. The deduction on this outgoing the company claim to be entitled to: and we think they are entitled to it. If this allowance had been attended with the consequence of quashing the rate, we should have been of a different opinion: but, as the rate may be amended, the sessions D ought to avail themselves of every light that can be afforded them down to the latest period antecedent to the actual making of the rate, in order to bring it to the greatest possible accuracy. The overseers, in making a prospective rate, are to make it on the supposed prospective value ascertained by them, as well as they can, from the latest evidence in their power as to antecedent value. It cannot be required of them that the assumed value and the actual value should correspond with perfectly minute accuracy. . . So, now and equally, we think, if the sessions are put in possession of a fact which existed before the rate made, as it is not E the absolute duty of the company to volunteer information, if the fact will have the effect of reducing the assessment and approximating it more nearly to actual accuracy, they should amend the rate accordingly.

The court was not there saying, and never has said, that quarter sessions or the assessment committee might pay regard to matters F affecting the valuation which had occurred after the date of the making of the rate. What was said was that quarter sessions might look at matters which had occurred after the date at which the company's accounts were closed, and between the date of the closing of the accounts and the date of the making of the rate. The court was emphasising G that, as the rate might be amended, the sessions ought to avail themselves of every light that could be afforded them down to the latest period antecedent to the making of the rate. It is not an authority, nor is there any authority, laying down that the rateable value can be fixed on materials which only come into existence after the making of the H rate. An assessment based on profits can be based on ascertained returns. The trend of the returns, as shown by such accounts as are existent, is material in considering the tenant's share, for it may reasonably be supposed that an ordinary tenant would pay regard to it, but the accounts and the trend of the return must be examined as they are known at the date of the assessment, and not in the light of facts which

have only happened and come to be known afterwards, and which could not, therefore, have been considered by either the hypothetical tenant or the landlord at the date of the assessment. The rateable value is not to be fixed, though it may be amended, on the basis of the wisdom which comes after the event. The court is of opinion that quarter sessions was right in paying regard to the last accounts before the date of A
assessment, and would not have been right in looking at the subsequent accounts.

The situation with regard to the estimates is quite different. The form of the question—namely, whether or not evidence relating to the estimates subsequent to 1934 was rightly excluded—suggests that these B
estimates were produced and tendered in evidence, but rejected as inadmissible. Para. 10 of the case, however, coupled with what we were told by counsel for the respondents took place at quarter sessions (and his statement about these facts was not challenged), shows that no such thing occurred. The estimates in question, according to para. 10, C
were estimates made by the respondents prior to Apr. 1, 1934, for each area for each year up to 1939. Supplementing this with what we were told, it appears that these estimates were private documents of the respondents, that they were not tendered by the respondents nor offered in evidence, that it was the appellants who asked that these documents D
should be produced and put before the court of quarter sessions, and that, when the respondents objected to produce them, the appellants sought a ruling that the respondents should be forced to produce them. It was in these circumstances, apparently, that quarter sessions ruled that they were inadmissible. E

It is well established that an inquiry with the object of fixing the rateable value is not an inquisition, and that the court does not compel the production of private material. If, when quarter sessions ruled, as the case states, that the documents were "inadmissible," they were using this expression in the sense that they would not force the respondents F
to produce them and to put them in evidence, the court of quarter sessions were clearly right. Furthermore, if the court of quarter sessions meant, not merely that, but also that, in their view, these estimates would not contain matter which it was right for them to take into consideration, they were, in our opinion, justified in this view, for these G
estimates were not, on the facts stated, documents containing any statements of actual facts. They were merely estimates containing hypothetical figures which might be used by the respondents for the purpose of framing tariffs. They did not represent any existent facts, nor did they include or record any facts which had already happened from H
which a deduction could be made about the probable trend of receipts. Every one of the assumptions which they made might be falsified by the actual events. There are no facts stated in the case which satisfy us that these estimates could have afforded, adopting the language already quoted, any light on the problem which had to be resolved

"down to the latest period antecedent to the actual making of the rate." The answer, therefore, to both questions asked is in the affirmative. The appeal is, therefore, dismissed.

Appeal dismissed with costs. Leave to appeal to the Court of Appeal.

Solicitors: *S. A. Jewers*, Town Clerk, Barking (for the appellants); *Richard H. Fox*, Solicitor, Central Electricity Board (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

WEST CHESHIRE WATER BOARD *v.* CROWE.

[KING'S BENCH DIVISION (Hawke, Charles and Hilbery, JJ.), **April 4, 1940.**]

Water Supply—Statutory company—Power to pay interest from revenue on money borrowed—Power to borrow for payment of interest on money borrowed out of capital—Whether power to borrow interest already paid out of revenue—West Cheshire Water Board Act, 1925 (*c. cxiii*), *s.* 83—*West Cheshire Water Board Act,* 1927 (*c. cxxiii*), *ss.* 41 (1) (*c*), 46 (1) (*d*).

The West Cheshire Water Board Act, 1925, s. 83, directs the appellants to pay out of revenue interest on moneys borrowed for the purposes of the appellants' undertaking. By the West Cheshire Water Board Act, 1927, s. 46 (1) (*d*), the appellants may borrow for the payment out of capital of interest on money borrowed for the construction of works until the completion thereof. For 9 years the appellants paid the interest out of revenue amounting to £51,000. Thereafter, as they required money to extend their works, the appellants sought to borrow the sum of £51,000, by virtue of the powers conferred by sect. 46 (1) (*d*) of the Act of 1927, for the payment out of capital of interest on money borrowed for the construction of works, which sum had already been paid out of revenue by way of interest. This item was disallowed by the district auditor:—

HELD: (i) the auditor was right in holding that sect. 46 (1) (*d*) of the Act of 1927 does not empower the appellants to borrow the sum for the purpose of paying out of capital interest already paid in previous years out of revenue under sect. 83 of the Act of 1925.

(ii) as sect. 83 of the Act of 1925 provides for the apportionment of any surplus of revenue among the constituent authorities, it is of vital importance that the statutes should be complied with.

[**EDITORIAL NOTE.** A water board empowered to borrow money for the payment out of capital of interest on money borrowed for certain purposes cannot repay to itself money already paid in respect of interest, but paid out of income. Having discharged the interest out of income, it has no subsequent right to reopen the transaction, so far as its own accounts are concerned, and charge those payments against capital.

AS TO FINANCE OF STATUTORY WATER COMPANIES, see HALSBURY, Hailsham Edn., Vol. 33, pp. 483-487, paras. 790-796; and FOR CASES, see DIGEST, Vol. 43, pp. 1100, 1101, Nos. 291-300.]

NOTICE OF MOTION for an order that the disallowance by the district auditor, by a certificate dated May 26, 1939, should be quashed. The facts are fully set out in the judgments.

Sydney G. Turner, K.C., and *C. Erskine Simes* for the appellants.

R. M. Montgomery, K.C., and *H. G. Robertson* for the respondent.

Hawke, J.: We are all of the opinion that the point which should determine this case is a very short one. We think that Mr. Wyndham Crowe was right in his decision. The West Cheshire Water Board Act, 1927, s. 46 (1) (*d*) means: "To borrow money in order to enable you to pay interest from time to time as you have to pay interest on money borrowed." The words are not susceptible of referring to payments made years previously. It does not matter whether it is eight years or a year or so, but the point is made more clear if one says "years previously." These words do not refer to interest which became due years previously and which has been paid out of revenue and finished with. This statute never contemplated anything of that sort. The argument of counsel for the appellants, admirable though it was, really amounted to this. This being a statutory body, its powers are, therefore, determined by the express words of the statute creating it. That statute did not give it the power which it now claims. What the board did was something very near that which was permitted by the statute. There is, however, no *cy près* doctrine dealing with cases of this sort, and it has to keep strictly within its powers. What it is proposing to do now is to borrow money, not for the purpose of paying interest. It will get no receipt from anybody for a payment of interest, because nobody will be paid interest. There is nobody to whom any interest is owing. Such a borrowing does not come within the terms of the statute.

I want to make one further observation. Counsel for the respondent has shown quite convincingly, to my mind, that this is a matter which could have made a good deal of difference to ratepayers within the area served by the board, and I am not prepared to accept the suggestion of counsel for the appellants that it has made no difference to anybody. If in fact all it has done is to deprive those ratepayers of the chance of getting some relief, they have been deprived of that, and that makes a difference. If this body is an elected one, I can quite understand what the views of the electors and the elected would be if rates were not reduced when they might be. I think that in this case there is certainly something of which the ratepayers have been deprived. It may be only a chance, though I should think probably it is a great deal more, but, on the plain reading of sect. 46 (1) (*d*) of the Act, I think that this money has been borrowed for a purpose which does not come within the words of that section, and that Mr. Wyndham Crowe was perfectly right in the decision to which he came. In my opinion, therefore, the motion must be dismissed.

Charles, J.: This matter comes before the court by notice of motion made on behalf of the West Cheshire Water Board:

> . . . for an order that the disallowance by John Wyndham Crowe, Esq., the district auditor for No. 5 Audit District by a certificate given under his hand dated May 26, 1939, of so much—namely, in each case the sum of £47,622—of the items of account of £51,000 entered in folios 130 and 286 of the ledger of the said West Cheshire

Water Board for the year ended at Mar. 31, 1938, as represents the loan interest on loans raised under the West Cheshire Water Board Act, 1927, s. 41 (1) (*c*), charged to the revenue account in the financial years prior to the year commencing on Apr. 1, 1937, should be quashed.

The grounds of appeal are as follows:

> . . . [the] entries in the accounts of the said board are correct in law. That the item of account of £51,000 was a borrowing on capital account of the sum necessary to pay out of capital interest on money borrowed for purposes of the West Cheshire Water Board Act, 1927, s. 41 (1) (*c*), and as such was duly authorised by sect. 46 (1) (*d*) of that Act.

It is agreed by all that the West Cheshire Water Board act, and can only act, strictly within the limits of the statutes which give them their being. By the West Cheshire Water Board Act, 1925, s. 83, they are directed:

> . . . [to] apply all money received by them on account of the revenue of the undertaking in the manner and in the order following . . . (2) In payment of the interest on moneys borrowed by the board for the purposes of the undertaking . . .

The West Cheshire Water Board Act, 1927, s. 46, provides as follows:

> The board may from time to time borrow at interest . . . for the purposes mentioned in the first column of the following table . . . (*d*) For the payment out of capital of interest on money borrowed for the purposes (*c*) mentioned in this subsection until the completion of works Nos. 1, 2 and 3 by this Act authorised . . .

They have two alternatives. They can pay interest on the money which they have raised out of revenue. If they do that, they pay the lender his interest—as, indeed, they are bound to do—year by year, and presumably receive receipts year by year for the interest so paid out of their revenue. For 9 years, that is what they did. They thought that that was the most proper, and the appropriate, way of satisfying the interest. Then, however, they wanted money in order to extend their works. They could go to the Minister for further borrowing if they liked, but they did not. They said that a convenient method would be to borrow, or to affect to borrow, under sect. 46 (1) (*d*) of the Act of 1927, which empowers borrowing for the payment out of capital of interest on money borrowed. When one comes to look into it, one sees exactly how this matter arose. Although it is said that there had been some simmerings in the minds of the board and the chairman and the manager which would lead one to believe that at some time there might be a borrowing, strangely enough it is on Mar. 9, 1937, that an interview is held with one Harry Prescott Hill, the engineer. At that interview, says the affidavit of one Robinson:

> The said Harry Prescott Hill expressed the view that the board should borrow the sum already paid out of revenue by way of interest.

That amounted to the sum of £51,000, and that is the money which they wanted to get into their hands. Was it for the purpose of paying interest? Let us see *vis-à-vis* the unfortunate auditor. The district auditor comes to that sum and says: "Have you any vouchers for interest?" "No, but I will tell you what we have got. If you go back 9 years, I can show you one gentleman who was paid interest out of revenue account." The auditor says: "What has that got to do with it? You have been satisfying the interest out of revenue. We do not go into past history." It was a complete transaction, and a transaction which, apparently, was carried out every year with perfect regularity and propriety, in accordance with sect. 83 of the Act of 1925. Then in the ninth year it is sought to borrow under the Act of 1925 the whole of that sum which has been so paid out of revenue, the board saying that it can be designated as money borrowed for the payment out of capital of interest on money borrowed for the purposes (*c*), which is the construction of works. I cannot bring myself to believe that sect. 46 (1) (*d*) means anything of the sort, or that it can possibly be applied to this set of circumstances. I was very attracted by the admirable argument of counsel for the appellants, in which he indicated that really it was only one manner of collecting money taking the place of another. Nothing else had happened. No one was hurt. The position of no one was altered, and it was all perfectly correct. If one looks at the last part of sect. 83 of the Act of 1925, one finds that there may have been a very great affecting of others by the course which was adopted:

> Lastly, the surplus (if any) including the interest on the reserve fund when such fund amounts to the prescribed maximum shall after retention by the board of such sum as is required for carrying on the undertaking be apportioned among and paid to the constituent authorities in proportion to the respective assessable values of their respective constituent areas.

The constituent areas—that is, in effect, the ratepayers—were vitally concerned in the method which was adopted. The method which was adopted was a perfectly proper method. The attempt to replace that perfectly proper method by what I venture to think, without offence, was an improper method ought not to be allowed. The auditor stopped it, and the appeal is from his decision. We come to the conclusion that his decision was a perfectly correct one.

HILBERY, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Lees & Co.*, agents for *E. Cecil Francis*, Ellesmere Port, Solicitor to the West Cheshire Water Board (for the appellants); *Sharpe, Pritchard & Co.* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

KING FEATURES SYNDICATE INC. AND SEGAR *v.* O. AND M. KLEEMANN, LTD.

[CHANCERY DIVISION (Simonds, J.), **March 6, 7, 20, 1940.**]

Copyright—Infringement—Cartoons depicting sailor—Reproduction in form of brooches and toys—Whether cartoons designs capable of being registered A *under Patents and Designs Acts*, 1907-1938—*Copyright Act*, 1911 (*c.* 46), *s.* 22 (1).

S. was the author of a large number of drawings or cartoons depicting as the central figure a grotesque and fictitious character known as "Popeye" or "Popeye the Sailor," and it was admitted that if there was copyright in these drawings or cartoons, which were published B from 1929 onwards in the United States of America and simultaneously in Canada, it was vested in the plaintiffs or one of them. The defendants, without the consent of the plaintiffs, caused to be made and imported into the United Kingdom, and have there sold, representations in various forms of a figure which they admitted to be the figure of a sailor. The material forms in which this figure was embodied were brooches or charms, plaster dolls and mechanical toys largely composed C of celluloid. The plaintiffs claimed that the figure was that of "Popeye the Sailor," and sued the defendants for damages for infringement of copyright and for an injunction. At the hearing they produced 55 drawings selected from among many thousands of drawings of Popeye which had appeared, and upon this it was contended on behalf of the defendants that, as their articles were admittedly copied from articles made by the D plaintiffs' licensees, and as it had not been proved or admitted that the latter articles had been copied from the 55 rather than from the thousands of other drawings, it was not proved that any copyright had been infringed:—

HELD: (i) where an artistic work in which copyright is claimed is a drawing in two dimensions, the copyright can be infringed by a toy figure which is in three dimensions.

E (ii) it is immaterial whether the infringing article is derived directly or indirectly from the original work.

(iii) the plaintiffs' works were not designs capable of being registered under the Patents and Designs Acts, 1907-1938, and were therefore protected by the Copyright Act, 1911.

(iv) the plaintiffs had not differentiated between the selected 55 drawings, so far as publication was concerned, and made no admission F upon which the defendants could rely for the suggestion that there were Popeye drawings in which no copyright subsisted. The plea on this ground was ill-founded.

[**EDITORIAL NOTE.** This case confirms previous decisions which have recognised an infringement of the copyright of a drawing in two dimensions by a figure or G solid in three dimensions. The more important part of the decision, however, is whether designs such as the well-known Popeye cartoons are designs capable of being registered under the Patents and Designs Acts, 1907-1938, for, if they were, they would not be protected by the Copyright Act, 1911, by reason of the exception enacted in sect. 22 (1) of that Act. This, of course, is purely a question of construction, and the decision is against these being designs capable of such registration.

H AS TO EXCLUSION OF CERTAIN DESIGNS FROM COPYRIGHT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 528, 529, para. 831; and FOR CASES, see DIGEST, Supp., Copyright, Nos. 108a-111a.]

Cases referred to:

(1) *Bradbury, Agnew & Co.* v. *Day* (1916), 32 T.L.R. 349; 13 Digest 210, *459.*

(2) *Burke & Margot Burke, Ltd.* v. *Spicers Dress Designs*, [1936] Ch. 400: [1936] 1 All E.R. 99; Digest Supp.; 105 L.J.Ch. 157; 154 L.T. 561.

(3) *Hanfstaengl* v. *Empire Palace, Ltd.*, [1894] 3 Ch. 109; 13 Digest 210, *460*; *on appeal, sub nom. Hanfstaengl* v. *Baines & Co.*, [1895] A.C. 20.

(4) *Ex p. Beal* (1868), L.R. 3 Q.B. 387; 13 Digest 210, *453*; 37 L.J.Q.B. 161; *sub nom. Graves* v. *Beal*, 18 L.T. 285.

(5) *West* v. *Francis* (1822), 5 B. & Ald. 737; 13 Digest 217, *539*.

(6) *Pytram, Ltd.* v. *Models (Leicester), Ltd.*, [1930] 1 Ch. 639; Digest Supp.; 99 L.J.Ch. 381; 143 L.T. 227.

(7) *Wood* v. *Stoddarts, Ltd.* (1931), Macgillivray's Copyright Cases (1928 to 1935), 294.

(8) *Con Planck, Ltd.* v. *Kolynos Incorporated*, [1925] 2 K.B. 804; Digest Supp.; 94 L.J.K.B. 923; 133 L.T. 798.

(9) *Ware* v. *Anglo-Italian Commercial Agency, Ltd.* (1922), Macgillivray's Copyright Cases (1917 to 1923), 346.

Action for damages for alleged infringement of copyright and for an injunction to restrain the defendants from continuing in such alleged breach. The facts are fully set out in the judgment.

E. J. Macgillivray, K.C., and *Frank Gahan* for the plaintiffs.

K. E. Shelley, K.C., and *A. D. Russell-Clarke* for the defendants.

Simonds, J.: The plaintiffs King Features Syndicate Inc. are an American corporation. The plaintiff Frank Cecil Betts is the personal representative of Elzie Crisler Segar, an American artist who died on Oct. 13, 1938. Segar was the author of a large number of drawings or cartoons depicting as the central figure a grotesque and fictitious character known as "Popeye," or "Popeye the Sailor." It is admitted that, if there is copyright in these drawings or cartoons, which were published from 1929 onwards in the United States of America, and simultaneously in Canada, it is vested in the plaintiffs, or one of them. The defendants, O. & M. Kleemann, Ltd., without the consent of the plaintiffs have caused to be made and imported into the United Kingdom, and have there sold, representations in various forms of a figure which they admit to be the figure of a sailor, and which the plaintiffs claim to be the figure of "Popeye the Sailor." The material forms in which this figure is embodied are brooches or charms, plaster dolls and mechanical toys largely composed of celluloid.

Apart from the serious question which arises under the Copyright Act, 1911, s. 22, it is not disputed that the drawings in question, so far as they have been published in Canada simultaneously with their publication in the United States of America, are "artistic work" in which copyright subsists under the Copyright Act, 1911, s. 1, nor that, under sect. 1 (2) of that Act, the sole right to produce or reproduce such work or any substantial part thereof in any material form whatsoever is vested in the plaintiffs. By sect. 22 of the Act, it is provided that the Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907 (now the Patents and Designs Acts, 1907-1932), with the exception therein contained.

The questions which I have to determine are (i) whether, apart from sect. 22 of the Act, the brooches, dolls, toys, or any of them are such reproductions in a material form of the plaintiffs' work as to constitute infringement of copyright, and (ii) whether in any case the work in which the plaintiffs claim copyright consists of designs which are capable of being registered under the Patents and Designs Acts, and which do not fall within the exception contained in sect. 22.

A Some further facts must be stated before these questions can be determined. The figure of "Popeye" is the central figure of a great many comic strips, running, it was said, into many thousands, which appeared in newspapers and journals in the United States of America and in Canada, and afterwards in this country. It is not to be doubted B that his face, features, figure and general get-up became very popular and well-known. His obvious peculiarities made it easy both to recognise and to imitate him. It was natural, therefore, that the plaintiffs should try to exploit his popularity in another medium, and, accordingly, in or before 1937, they granted licences to certain persons or companies, C amongst others Cecil Coleman, Ltd., and Moritz & Chambers, Ltd., to manufacture and sell in the United Kingdom brooches and mechanical dolls of certain types, simulating the figure of "Popeye." Large quantities of such articles were sold, and the plaintiffs were paid substantial sums by way of royalties.

D The defendants, who are manufacturers and vendors of toys, saw possibilities of doing business. They first approached a company whom they addressed as "The Paramount Films," under the impression that they were the owners of the copyright, and it is significant that they asked:

> E . . . what terms you are prepared to issue a licence to us for the marketing of "Popeye the Sailor."

They had then no doubt either of the unique character of "Popeye" or of the subsistence of copyright in the plaintiffs' work. Eventually they got into touch with the plaintiffs, but were unable to accept the F terms upon which a licence was offered. In the meantime, they had been in correspondence with one of their directors, then travelling in Japan, to whom on Feb. 24, 1937, they had sent a sample, which they thus described:

> A sample of brooch, Popeye Sailor, which is being sold in large quantities to G showmen.

They added:

> It is being sold by Cecil Coleman at 12*s.* per gross, and I think we could do quite a big business in this.

As the result of this letter, an order was given to Winckler & Co., of H Kobe, and goods were despatched by them to the defendants in the United Kingdom, those goods being invoiced with the description:

> Popeye Brooches each on a card, 200 gross, 5*s.* 6*d.* per gross.

The sterling value of the consignment was stated to be approximately £400. This was followed by numerous other consignments of similar brooches, one consignment alone being of 2,000 gross, and, at a later date, by consignments of celluloid mechanical figures and plaster dolls described as "Cell. Popeye," or "Plaster-filled Popeye," or "Clay-filled figure Popeye," or "Mechanical Popeye toy," or by some similar title. Some of these importations were made after the writ in this action had been issued, but I was invited by counsel on each side to ignore that fact for the purpose of my decision.

The plaintiffs claim that all the articles so imported infringe their copyright. They further claim that their copyright has been infringed by the designs annexed to two applications made by the defendants in Sept., 1937, and Nov., 1937, for registration under the Patents and Designs Acts. These are designs respectively of the brooch and doll which the defendants had imported from Japan. Perhaps these applications may be regarded as a manœuvre in the contest between the parties. The issue is sufficiently raised by the articles which have been imported and sold.

The first question which has been debated is whether or not, where the artistic work in which copyright is claimed is a drawing in two dimensions, it can be infringed by something such as a toy figure which is in three dimensions. It appears to me that the introduction into the Copyright Act, 1911, s. 1, of the words "in any material form whatsoever," which were not in the Fine Arts Copyright Act, 1862, lays at rest any doubt which might have been felt upon this point. This was the view taken by Coleridge, J., in *Bradbury, Agnew & Co.* v. *Day* (1), in which he held that so-called "living pictures" might be possible subjects of infringement of copyright in an artistic work. In my judgment, it would be contrary to the plain meaning and spirit of the Act if a copy of an artistic work were an infringement only if made in the same dimensions, so that, for example, copyright in a sketch would not be infringed if the exact design were reproduced either in a frieze made with some measure of relief or in a sculptured pediment. It may be that, where an artistic work in two dimensions is reproduced in a different medium in three dimensions, much will be added to it by the genius of the reproducer, and it may be difficult to recognise the original in the reproduction. However, the same difficulty arises in literary copyright where the original is a novel and the alleged infringement a drama, or in musical copyright where the original is an operatic air and the infringement a piece of dance music embodying some part of it. This only means that the question of infringement of copyright is usually a question of degree, and that, where the medium is not the same, the question is apt to be one of greater difficulty. The defendants have relied upon the decision of Clauson, J., in *Burke & Margot Burke, Ltd.* v. *Spicers Dress Designs* (2). There is nothing in the judge's judgment, however, to suggest that he thought that there could not be infringement of copyright in a sketch by reproduction in a three-dimensional form. He decided merely that in that case there was no infringement.

Next, it was urged on behalf of the defendants that the alleged infringing articles did not reproduce any substantial part of the plaintiffs' work, and in this connection it was contended that they could not be reproductions of the plaintiffs' work because they were copied from the articles made by the plaintiffs' licensees, who had themselves made use of the plaintiffs' work. The latter contention is untenable. It must be immaterial whether the infringing article is derived directly or indirectly from the original work. The standard is objective. The question is whether or not the original work, or a substantial part thereof, has been reproduced. If it has been, then it is no answer to say that it has been copied from a work which was itself, whether licensed or unlicensed, a copy of the original. For this proposition there is ample authority: see, for example, *Hanfstaengl* v. *Empire Palace, Ltd.* (3), at p. 116, where STIRLING, J., cites and applies the words of BLACKBURN, J., in *Ex p. Beal* (4) [p. **394**]:

> When the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or through intervening copies ...

This view of copyright law has never, I think, been doubted, and is plain common sense.

The question then is whether or not the defendants' articles reproduce the plaintiffs' work, or a substantial part thereof. In my judgment, they clearly do. In *West* v. *Francis* (5), BAYLEY, J., said, at p. **743**:

> A copy is that which comes so near to the original as to give to every person seeing it the idea created by the orginal.

Whatever test is applied or definition used, whether or not there is sufficient resemblance to constitute infringement remains a question of degree. In the present case, the characteristic peculiarities which persist through scores of drawings of "Popeye" are repeated in the brooches, toys and dolls. These articles recall to the mind of the public, as they are meant to recall, the familiar figure which they have so often seen in the newspaper comic strips. They are called "Popeye" brooches or toys or dolls just in order to attract the attention of a friendly *clientèle*. It cannot be doubted that here is the essential "Popeye," greeting his admirers in a new material form.

A final argument upon this part of the case must be noticed. In opening the case, counsel for the plaintiffs said that, of the thousands of drawings of "Popeye" which had appeared, he had selected 55, so as not to overburden the court, and was content to rest his case upon them. These 55 were all admitted to have been published in Canada. Upon this, counsel for the defendants contended that, as the defendants' articles were admittedly copied from the articles made by the plaintiffs' licensees, and, as it had not been proved or admitted that the latter articles had been copied from the 55 rather than from any other of the thousands of drawings, or that any drawings other than the 55 had been published in Canada simultaneously with publication in the United States of America, it was not proved that any copyright had been infringed. I should not think it necessary to notice this somewhat unattractive argument had it not been developed at some length. It is, in my opinion, ill-founded. No such plea is to be found in the defence, and it rests upon taking out of its context part of counsel's opening statement. Counsel for the plaintiffs did not differentiate between the selected 55 drawings so far as publication was concerned, and made no admission upon which counsel for the defendants could rely for the suggestion that there were "Popeye" drawings in which no copyright subsisted. I come, then, to the conclusion that, apart from sect. 22 of the Act, the plaintiffs owned copyright in the "Popeye" drawings, and that the defendants have in each of the articles infringed it.

I turn to the question whether the plaintiffs' sketches are designs capable of being registered under the Patents and Designs Acts, 1907-1932. If they are such designs, then copyright under the Copyright Act, 1911, cannot be claimed for them unless they fall within the exception —that is, unless they are not used, or intended to be used, as models or patterns to be multiplied by any industrial process. What are "designs capable of being registered" under the relevant Act? Under the Patents and Designs Acts, 1907-1932, s. 93:

> ... "design" means only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction ...

This definition presents many difficulties when read in conjunction with the Copyright Act, 1911. Sect. 22 of that Act assumes the possibility of the existence of something in which copyright might subsist, and which is yet capable of registration under the Patents and Designs Acts. I must make the same assumption, and, for this purpose, must proceed so far as I can upon the footing that, just as the Copyright Act affords protection, not for ideas, but for the embodiment of ideas in the form of words or music or artistic works, so the Patents and Designs Acts afford protection, not for an abstraction, but for features of shape, configuration, and so on "applied to any article by any industrial process or means," so that, in each case, it is the concrete form, and not the abstract idea, which is protected. If it were not so, no effect could be given to the Copyright Act, 1911, s. 22, for it would not be possible to co-relate the two Acts.

It is important to bear this in mind, for the word "design" in relation to art may in ordinary usage mean either (i) a plan, idea or conception, or (ii) the artistic idea as executed, or the combination of artistic details which go to make up the picture or other work of art, and it is difficult to avoid the conclusion that the distinction has not been clearly observed in the definition and treatment of "design" in the Patents Acts. For instance, the same design may be registered in more than one class. It is something, then, which may be applied to different sorts of articles. It is surely, then, a conception which may be applied to a material article, not a material article to which a conception has been applied. However, if in truth a "design" is only a conception, then no artistic work to which the Copyright Act would otherwise apply is capable of registration as a design, for the Copyright Act gives no protection to ideas. Further, the protection which the Patents Acts give to designs—design-copyright as it may be called—is the exclusive right to apply a design to articles in a particular class, and not the exclusive right to copy or reproduce an artistic work in any material form. It is apparent, I think, that the marriage of copyright under the Copyright Act and design-copyright under the Patents Acts in sect. 22 of the former Act must lead to serious confusion, and so in truth it has.

In *Pytram, Ltd.* v. *Models* (*Leicester*), *Ltd.* (6), the question arose in regard to a model of a wolf cub's head produced from a mould in *papier maché* and intended to be displayed as their totem on the tops of poles by the Boy Scouts' Association. This was an artistic work in which the plaintiffs had copyright apart from sect. 22 of the Act, and the problem was whether or not sect. 22 of the Act applied so as to exclude that right. Clauson, J., held that the model fell within the definition of "design" in the Patents Acts. He must, I think, be taken to have rejected in regard to works of sculpture the argument addressed to him on behalf of the plaintiffs to the effect that application to an article means application to an article which does not exist merely as a vehicle for the expression of the artistic conception, for he says, at pp. 646, 647:

> As I read the Act, the copyright in that article of sculpture is given to the author of it in the first instance, but that copyright is taken away by the first part of sect. 22 if (as would at all events in many cases, if not all, be the fact) the sculpture comes within the term "design" as defined in the Act of 1907 and is, accordingly, capable of being registered under that Act . . . I see no escape from the position that this model was a design capable of being registered under the Act.

What is true of the model of a wolf cub's head must be true of the model of anything else, and I must regard this decision as an authority for the proposition that every piece of sculpture is, *prima facie*, a "design" capable of registration under the Patent Acts. In *Wood* v. *Stoddarts, Ltd.* (7), the same view was taken by Farwell, J., in regard to a plaster model of the human figure or of an animal made for the purpose of casting metal toys. The judge held that such models were capable of registration, and, therefore, were not protected by the Copyright Act.

So far, I have considered the case of sculpture. I turn to what is the only authority upon the application of sect. 22 to artistic drawings or sketches. In *Con Planck, Ltd.* v. *Kolynos Incorporated* (8), the plaintiffs were the owners of the copyright, if it subsisted, in two sketches for cut-out advertisement showcards representing a pierrot and pierrette with large faces and diminutive bodies, and the question was whether or not these sketches were designs capable of registration under the Patents Acts. Sankey, J., held that they were, but perhaps the important part of his judgment is that he by no means laid down the proposition that all sketches or all pictures are "designs" capable of registration. On the contrary, whilst holding that the particular sketches were "designs," he was disposed to favour the view that [p. 815]:

> . . . a design is something produced as a pattern to assist one in making some other article . . . a thing which has no market in itself but is meant to be applied to some other article.

This is the view which had been expressed in Copinger's Law of Copyright, 5th Edn., but was, at any rate in regard to works of sculpture, rejected by Clauson, J. I am not aware of any other case which can guide me. Cases such as *Ware* v. *Anglo-Italian Commercial Agency, Ltd.* (9), in which a drawing is intended to be a design for a commercial article, do not throw any light on this case.

If the defendants are right in saying that the plaintiffs' sketches here in question are capable of registration, then all sketches are capable of registration, and, if all sketches, then all paintings. I cannot differentiate. For example, a picture exhibited in the Royal Academy is capable of registration as a design. It may or may not fall within the exception. That might depend on whether or not it was used as a pattern to be multiplied by the industrial process of photography or by any other process. Must I hold that this is the law ? I do not think, though perhaps the distinction is a fine one, that the cases upon works of sculpture or models are decisive in regard to sketches. It may be, as Clauson, J., said in *Pytram, Ltd.* v. *Models* (*Leicester*), *Ltd.* (6), that there is no escape from the position that a model is capable of registration as a design. In the model itself there are features of shape or configuration applied to an article—that is, a substance artificial or natural. It might, I would respectfully suggest, be open to question whether the features had been applied to the article by any "industrial process or means." Nevertheless, however that may be, if the question is asked whether or not, for instance, an oil painting comes within the definition "the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means . . ." to me at least the answer seems a simple one—namely, that it does not. If it does not, an oil painting cannot be registered as a design. It appears to me that the distinction to which Sankey, J., referred in *Con Planck, Ltd.* v. *Kolynos Incorporated* (8) is, in regard to sketches, a valid one. It is repeated in Copinger's Law of Copyright, 7th Edn., p. 67, where the subject is treated with admirable lucidity. If I look at a picture and ask myself whether or not it is an article to which, by some industrial process or means, features of shape, configuration, pattern or ornament have been applied, I am equally at a loss to know what is the article to which by some industrial process or means features of shape and so on have been applied, and what is the industrial process or means by which they have been applied. I see no reason why I should enlarge the plain meaning of the definition in order to bring within it the case of an ordinary painting, drawing or sketch.

I have abstained from considering the general rules, which, by the Copyright Act, 1911, s. 22 (2), were authorised to be made under the
A Patents and Designs Acts, 1907-1932, s. 86, for determining the conditions under which a design is to be deemed to be used as a model to be multiplied by any industrial process, for it cannot, in my judgment, assist in solving the question whether or not a picture is capable of registration as a design under the Patents Acts to read the rules which are made to determine
B whether or not, for the purpose of the Copyright Act, a design otherwise registrable is to be excepted. I come to the conclusion that the plaintiffs' sketches are not capable of registration as designs, and that they are, therefore, protected by the Copyright Act. I will grant the appropriate injunction and direct the usual inquiry as to damages.
C The defendants must pay the costs of the action.

Judgment for the plaintiffs with costs. Injunction granted.

Solicitors: *Shaen, Roscoe, Massey & Co.* (for the plaintiffs); *Derick R. Martin & Co.* (for the defendants).

D [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re EYRE COOTE, CAVERS AND ANOTHER *v.* KAYE AND OTHERS.

E [CHANCERY DIVISION (Morton, J.), **March 7, 8, 12, 13, 1940.**]

Wills—Heirlooms to be enjoyed by person for time being "actually" entitled to mansion house—Proviso against absolute ownership by tenant in tail unless attaining 21 *or dying under that age leaving lawful issue—Death over* 21 *by first tenant in tail by purchase when prior life interests still existing—Whether actual possession condition of ownership.*

F By his will, dated June 18, 1857, the testator bequeathed to his trustees certain chattels upon trust to permit them to be enjoyed as heirlooms "by the person who shall for the time being be actually entitled to my said mansion house . . . yet so that the same shall not vest absolutely in any person hereby made tenant in tail by purchase of my said mansion house unless such person shall attain the age of 21 years or dying under
G that age shall have lawful issue living at his or her death." The first tenant in tail by purchase under the provisions of the will attained the age of 21 years, but did not survive his father and did not come into actual possession, his interest at the time of his death being subject to the life interests of his father and uncle:—

HELD: the first tenant in tail by purchase was entitled to the heirlooms absolutely, since he attained the age of 21 years, and since the
H testator, by using the words "actually entitled," had not indicated with reasonable certainty that he intended to make ownership of the heirlooms dependent upon the tenant in tail coming into actual possession of the mansion house.

[**EDITORIAL NOTE.** It is often desired to settle chattels to devolve with a title. Before 1926, this desire was often frustrated, since it was not possible to create an entailed interest in personalty. Several devices were employed to prevent the absolute vesting of the heirlooms in the tenant in tail. Among these devices was one providing that the heirlooms should not vest absolutely in a tenant in tail by purchase unless he attained the age of 21 years or died under that age leaving lawful issue. In the present case, the tenant in tail attained the age of 21 years, but died before the determination of the prior life interest by the death of his father. There was a condition that the heirlooms should be enjoyed only by the person who for the time being should be actually entitled to the mansion house. After a consideration of all the authorities, and particularly *Re Parker, Parker* v. *Parkin* (3), it is held that the testator had not sufficiently indicated an intention that the ownership of the heirlooms should be conditional upon actual possession of the mansion house.

As to Settlement of Personalty to Devolve with Realty, see HALSBURY, Hailsham Edn., Vol. 29, pp. 797-802, paras. 1105-1108; and for Cases, see DIGEST, Vol. 40, pp. 794-796, Nos. 3236-3245.]

Cases referred to:

(1) *Foley* v. *Burnell* (1785), 4 Bro. Parl. Cas. 319; 44 Digest 947, *8017*; *affg.* (1783), 1 Bro. C.C. 274.

(2) *Scarsdale* (*Lord*) v. *Curzon* (1860), 1 John. & H. 40; 44 Digest 944, *8003*; 29 L.J.Ch. 249; 3 L.T. 29.

(3) *Re Parker, Parker* v. *Parkin*, [1910] 1 Ch. 581; 44 Digest 949, *8028*; 79 L.J.Ch. 161; 101 L.T. 943.

(4) *Portman* v. *Portman* (*Viscount*), [1922] 2 A.C. 473; 44 Digest 949, *8032*; 91 L.J.Ch. 708; 128 L.T. 129; *affg.* S.C. *sub nom. Re Harcourt, Portman* v. *Portman*, [1921] 2 Ch. 491.

(5) *Re Angerstein, Angerstein* v. *Angerstein*, [1895] 2 Ch. 883; 44 Digest 949, *8026*; 65 L.J.Ch. 57; 73 L.T. 500.

(6) *Re Fothergill's Estate, Price-Fothergill* v. *Price*, [1903] 1 Ch. 149; 44 Digest 945, *8009*; 72 L.J.Ch. 164; 87 L.T. 677.

(7) *Re Chesham's* (*Lord*) *Settlement, Valentia* (*Viscount*) v. *Chesham* (*Lady*), [1909] 2 Ch. 329; 44 Digest 946, *8010*; 78 L.J.Ch. 692; 101 L.T. 9.

(8) *Re Beresford-Hope, Aldenham* v. *Beresford-Hope*, [1917] 1 Ch. 287; 44 Digest 949, *8030*; 86 L.J.Ch. 182; 116 L.T. 79.

(9) *Re Fowler, Fowler* v. *Fowler*, [1917] 2 Ch. 307; 44 Digest 945, *8005*; 86 L.J.Ch. 547; 117 L.T. 500; *on appeal*, [1917] 2 Ch. p. 324.

(10) *Re Lewis, Busk* v. *Lewes*, [1918] 2 Ch. 308; 44 Digest 949, *8031*; 87 L.J.Ch. 652; 119 L.T. 564.

Adjourned Summons to determine upon what trusts the trustees of the will, dated June 18, 1857, of Eyre Coote, who died on Aug. 23, 1864, held certain chattels settled by the will, together with the mansion house, West Park, to be enjoyed as heirlooms "by the person who shall for the time being be actually entitled" to the mansion house. The summons asked, *inter alia*, whether the heirlooms were held on trust (*a*) as to one half for Mrs. Kaye and as to the other half for John Aubrey Coote Sykes, (*b*) as to the whole for the personal representatives of Charles Gartside Eyre Coote, or (*c*) as to the whole as part of the testator's residuary personal estate, or on what other trusts.

The testator devised the mansion house to trustees to the use of his eldest son for life and proceeded as follows:

> . . . and from and immediately after the decease of my said son to the use of his first and other sons successively according to their respective seniorities in tail male and in default of such issue to the same or the like uses in favour of my second and other sons successively according to their respective seniorities and

> their first and other sons successively in tail male respectively and in default of such issue to the use of the first and other sons of my oldest son successively according to their respective seniorities in tail and in default of such issue to the use of the daughter or daughters of my oldest son in tail if more than one as tenants in common with cross remainders in tail and in default of such issue to the same or the like uses in favour of the first and other sons and the daughter or daughters of my second and other sons successively according to seniority and in default of such issue to the use of my eldest daughter and her assigns for her life without impeachment of waste (except as aforesaid) . . .
>
> I give and bequeath unto [the trustees] their executors administrators and assigns all my plate and plated articles glass china pictures prints statues bronzes articles of *vertu* books household furniture and effects goods and chattels (except wines and liquors and other consumable articles) which shall be my property in or about or belonging to or ordered for my said capital mansion house called West Park aforesaid and also all my family jewels swords armour and arms firearms and all articles presented to me or any of my ancestors upon trust to permit the same to go and be held and enjoyed by the person who shall for the time being be actually entitled to my said mansion house under the said limitations of this my will as or in the nature of heirlooms yet so that the same shall not vest absolutely in any person hereby made tenant in tail by purchase of my said mansion house unless such person shall attain the age of 21 years or dying under that age shall leave lawful issue living at his or her death yet nevertheless such tenant shall during his or her respective minority be entitled to the use and enjoyment of all the said chattels and effects. . . .

Then there followed a provision as to inventories, which referred to the inventories being signed by the person or persons for the time being entitled to the use and enjoyment of the chattels and effects, thus indicating that the testator did contemplate that more than one person might be entitled for the time being to the use and enjoyment of the chattels. Then the testator gave his moneys, securities for money and the rest and remainder of the personal estate and effects whatsoever and wheresoever unto the trustees, their executors, administrators and assigns:

> . . . upon trust for the persons to whom and in the shares and proportions in which the same would be distributed under the statute for the distribution of the personal estate and effects of persons who have died intestate.

A. Andrewes Uthwatt for the plaintiffs, the trustees.

G. A. Rink for the infant defendant.

Hubert Rose and *E. J. Heckscher* for the first and second defendants, personal representatives of the first tenant in tail.

Edward Bagshawe and *George A. Russo* for the third and fourth defendants, next of kin of the testator.

MORTON, J.: The facts are these. The testator died on Aug. 23, 1864, having made a codicil to his will which is immaterial for the present purpose. He had four children—namely, Eyre Coote, who died without issue on May 6, 1925, Charles Henry Eyre Coote, who died on Nov. 23, 1938, a son who died an infant in 1876, and the defendant Lady Northbrook. Thus, under the will the successive tenants for life of West Park were (i) the testator's eldest son, Eyre Coote, and (ii) his second son, Charles Henry Eyre Coote. Charles Henry Eyre Coote had three children. The first child was Charles Gartside Eyre Coote, to whom for brevity I shall refer as Charles. He was born on Dec. 2, 1896,

and died unmarried on Mar. 22, 1918. He was thus the first tenant in tail by purchase under the provisions of the will, and he did attain the age of 21 years, but he did not come into actual possession (to use a phrase which appears in many of the cases) of West Park, because at the time of his death his interest as tenant in tail was subject to the
life interest of his uncle and his father. The second child of Charles A
Henry Eyre Coote was the defendant Mrs. Evelyn Gertrude Eyre Kaye. She is of age. The third child of Charles Henry Eyre Coote was Nina Violet Eyre Sykes, who was married in 1931 and died in 1935, leaving her surviving two children, of whom the elder was the defendant John
Aubrey Coote Sykes, an infant. The position is, therefore, that on his B
birth Charles became, as I have said, first tenant in tail male by purchase of West Park, but he never came into actual possession of that mansion house. When Charles' father died in 1938, the persons who became entitled to West Park, subject to a statutory trust for sale
(which is imposed by the Settled Land Act, 1925, s. 36), and subject to C
a certain rentcharge, were these. As to one half, Mrs. Kaye became entitled as tenant in tail by purchase, and, as to the other half, John Sykes (as I shall call him) became entitled as the tenant in tail by descent, and there were cross-remainders in tail.

In those circumstances, the question which I have to decide is who D
it was that became entitled to the heirlooms on the death of Charles' father in 1938. There are four claimants. In the first place, counsel for the defendant Mrs. Kaye says that, on the death of Charles Henry Eyre Coote, she became the only person who answered the description of:

> . . . the person who shall for the time being be actually entitled to my said mansion E
> house under the said limitations of this my will. . . .

He contends that Charles was cut out from this gift by reason of the fact that he did not survive his father. The words "actually entitled," he submits, mean entitled to the actual possession of the mansion house,
and he endeavours to dispose of the claims of John Sykes by saying that F
he is not a tenant in tail by purchase, as is the fact, and that he is not qualified under the description. The second contention is that of counsel for the infant defendant, who says that Mrs. Kaye and the infant defendant both answer the description of the person who is to
take these chattels, and that they are entitled to the chattels in equal G
shares. The third contention is that of counsel for the personal representative of Charles, who says that the chattels vested in Charles on his birth, and that, as he attained the age of 21 years, his interest in them was never divested. Lastly, counsel for the last two defendants, who
represent the testator's next-of-kin, submits that there is an intestacy. H

I think that the first question which I have to consider is whether or not Charles was cut out of the gift by reason of the fact that he failed to survive his father. In dealing with the claims which I have mentioned, I must bear in mind the rule which was settled at least as long ago as *Foley* v. *Burnell* (1). That rule was in full force when the testator died in 1864, and had been re-stated in 1860 by Sir W. Page Wood, V.-C., in *Scarsdale* (*Lord*) v. *Curzon* (2). It was thus re-stated by Parker, J., in *Re Parker, Parker* v. *Parkin* (3), at pp. 584, 585 :

> It is, in my opinion, clear, both on principle and on authority, that, where chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitations of the settlement becomes entitled to the real estate for a vested estate of inheritance, whether in possession or remainder, becomes absolutely entitled to the chattels, subject, of course, to his interest being defeated by any event which would defeat his estate in the realty, and, if such estate is in remainder, subject to all prior limited interests such as interests for life. This rule is thought to give effect, and does, in my opinion, give effect, to the testator's expressed intention as nearly as the nature of the property admits, it being impossible wholly to effectuate such intention, because the law does not allow the creation of estates or heritable interests in personal property, and has rules against perpetuities. A settlor may, of course, use words showing an intention to modify the rule, but the words relied on for this purpose must indicate such intention with reasonable certainty. Thus it is possible to introduce a provision defeating the interest of a tenant in tail by purchase who dies under the age of 21 years, but such a provision will not be implied merely by a direction that the real estate and chattels shall go together as long as the rules of law and equity permit. There must be an express provision to that effect. Similarly it is possible to introduce provisions defeating the interest of a tenant in tail who does not come into actual possession of the property ; but words which are to have this effect must be reasonably clear and certain. Further, in considering whether the testator has manifested an intention contrary to the ordinary rule, the court ought not to be influenced by the actual events which have occurred. If the real estate be settled on a father for life, with remainder to his first son in tail, and a son is born and dies in early infancy, probably a settlor would say that it would not effectuate his intention to give the son an absolute interest in the heirlooms which the father would take as his administrator ; but this would be no reason why the court should lay hold of doubtful expressions and infer therefrom an intention to defeat the son's interest unless he came into actual possession, for had the son attained 21 and joined with his father in resettling the realty, it is equally probable that the settlor would have said that his intention could only be effectuated by a resettlement of the heirlooms, which would be impossible unless the son had a vested interest, although he had not become entitled to actual possession of the realty. Indeed, it is precisely for this reason that, in the opinion of conveyancers, provisions defeating the interest of a tenant in tail unless he comes into possession are undesirable.

In construing this clause, therefore, I must bear in mind this rule. As a matter of first impression, and apart altogether from the rule, I might possibly have arrived at a different conclusion. I do not know. However, I must approach the clause before me bearing in mind the fact that, in the absence of words to the contrary, Charles would have become entitled to those chattels on his birth, and absolutely. There are clear words excluding him in the event of his not attaining the age of 21 years, but are there words which, to use the language of Parker, J., make it reasonably clear and certain that Charles is excluded if he fails to come into actual possession of West Park ? The rule which I have just quoted was referred to with approval by Viscount Birkenhead, L.C., in *Portman* v. *Portman* (*Viscount*) (4), at p. 485. What is the effect in this will of the words " actually entitled to my said mansion house under the said limitations of this my will " ? I think that I can start by saying that, if the word " actually " had not appeared in this clause, I should be bound to hold, in view of the rule which I have stated, and in view of previous decisions, that Charles' interest was not dependent upon his coming into actual possession of the mansion house. Counsel for the defendant Mrs. Kaye in his very helpful argument referred me to a number of cases. In the first place, he referred to *Scarsdale* (*Lord*) v. *Curzon* (2), which I have already mentioned. In that case, the relevant words were [p. 67]:

> In trust for the person or persons who for the time being shall, by virtue of the limitations hereinbefore expressed and contained, be seised of or entitled to the actual freehold of the said capital messuage or mansion-house. A

It is important to note that in that case the phrase "actual freehold" was used in other parts of the will in such a sense that SIR W. PAGE WOOD, V.-C., said, at p. 66:

> . . . but I think it impossible to give to the words "the person seised of or entitled to the actual freehold" any other meaning than the person in possession. I am far from saying that the words "actual freehold" have any such technical sense; nor do I rest my opinion on the phraseology pointed out in some passages of COKE UPON LYTTLETON; but, on the whole of this settlement, I have no doubt about the meaning of these words. It is not necessary to go through all the clauses which have led me to this conclusion, but I may mention, by way of example, the powers of jointuring given to children, "whether they shall or shall not be in possession, or entitled to the actual freehold." There you cannot deprive the word "actual" of all special significance without making nonsense of the clause, because there could be no children who would not be entitled to the freehold *simpliciter*, either in possession or remainder. "Actual," therefore, must mean in possession, or the clause would have no meaning. That is the strongest instance; but there are numerous examples of the same kind. B C

Then he gives other examples. Thus, on the wording of the will which SIR W. PAGE WOOD, V.-C., had to consider, he felt that he could only come to the conclusion that, when the words "actual freehold" were used, they signified freehold in actual possession. Contrasting that case with the case before me, I find that the word "possession" does not appear at all in the clause which I have to construe, and yet in other parts of the will the testator repeatedly uses the words "actual possession," so that he was perfectly familiar with the phrase, and, if he had wanted to make the interest of the tenant in tail dependent upon his coming into actual possession, there would have been no difficulty in saying "who shall for the time being be entitled to the actual possession of my said mansion house." Instead of that, he has used the words "actually entitled," and, for my part, I find great difficulty in giving to the words "actually entitled" any meaning different from that which I give to the word "entitled." In some ways, if the testator had made his own dictionary, as was the case in *Scarsdale* (*Lord*) v. *Curzon* (2), the words might well be given the significance for which counsel for the defendant Mrs. Kaye and counsel for the infant defendant contend, but, in my view, in this will they remain words of doubtful significance, and I cannot find that they are reasonably clear and certain. I have some suspicion that the testator may have intended the words "actually entitled" to refer to actual possession, but I do not feel at all convinced upon the point, bearing in mind, as I think I must, that, if the words had been "entitled to my said mansion house under the said limitations of this my will," there would have been no doubt that actual possession was not essential in order to enable the tenant in tail to take. The next D E F G H case to which counsel for the defendant Mrs. Kaye referred was *Re Angerstein, Angerstein* v. *Angerstein* (5). In that case, there were two contrasted clauses, one being "shall . . . be entitled to the actual possession of my said freehold estates in the county of Norfolk," and the other being "entitled in possession to my said freehold mansion house." In that case, KEKEWICH, J., thought that the introduction of the word "actual" made a large and important difference. In the case of one of those clauses, he held that actual possession was essential, and, in the case of the other clause, he held that it was not. Again, in *Re Fothergill's Estate, Price-Fothergill* v. *Price* (6), SWINFEN EADY, J., had to consider again two contrasted clauses, one being "in the actual possession or entitled to the receipt of the rents and profits" of certain real estates, and the other being "entitled to the possession or receipt of the rents" of the settled estates. Again, SWINFEN EADY, J., drew a distinction between those two clauses, and held that one denoted actual possession and the other did not. Counsel for the defendant Mrs. Kaye then referred to *Re Chesham's (Lord) Settlement, Valentia (Viscount)* v. *Chesham (Lady)* (7), which can perhaps be described as the highwater-mark of the decisions to the effect that actual possession is essential. There the headnote is as follows:

> By a settlement of real estates made in 1877, plate, pictures, and chattels were assigned to trustees "upon trust to permit the same to be used, held, and enjoyed with the mansion house aforesaid by the person who for the time being shall be entitled to the said mansion house under the limitations thereof herein contained," yet so that for the effect of transmission they should not vest absolutely in any person thereby made tenant in tail male by purchase who should not attain the age of 21 years.

That case has never been overruled. It was referred to in *Portman* v. *Portman (Viscount)* (4) by VISCOUNT BIRKENHEAD, L.C., in the following terms, at pp. 487, 488:

> It is clear from the judgments that the Court of Appeal was influenced by former decisions, though these were not binding upon them. The only question was whether the court was satisfied that it was intended that no person should take unless he became tenant in tail in possession of the settled estate. The court was so satisfied on the ground that the words "with the mansion house" were an essential part of the trust, and unless the tenant in tail were in actual possession the enjoyment of the chattels might be divorced from the enjoyment of the mansion house, whereas the chattels were only to be enjoyed with the house. I am satisfied that the court considered that the trust was an application of the fourth rule in *Scarsdale (Lord)* v. *Curzon* (2) and that there is nothing in the decision which throws doubt upon the principles laid down in the earlier cases. The decision has been criticised and commented upon in *Re Beresford-Hope, Aldenham* v. *Beresford-Hope* (8); *Re Fowler, Fowler* v. *Fowler* (9); and *Re Lewis, Busk* v. *Lewes* (10), and it may, without excessive irony, be said that it has been distinguished with more zest than it has been followed. I agree with WARRINGTON, L.J., that it is "very difficult to reconcile the decision with *Foley* v. *Burnell* (1)" and I find it proper to add that the force attributed to the verbs used, and in particular to the word "enjoyed," goes beyond the decision in any other case, whether earlier or later. The words used in the bequests of Colonel Harcourt, to which I now turn my attention, are, however, not such as render it necessary to consider whether in *Re Chesham's (Lord) Settlement, Valentia (Viscount)* v. *Chesham (Lady)* (7) was rightly decided or should be overruled; *Re Parker, Parker* v. *Parkin* (3) was nearer to *Chesham's* case (7) than the present appeal, and there PARKER, J., distinguished it and in my opinion he was right in so doing. I do not myself regard *Chesham's* case (7) as being more than a particular application of the principles governing this class of cases or as having laid down any principle or exception of general application.

I think that it is clear from that passage that, although *Re Chesham's* (*Lord*) *Settlement, Valentia* (*Viscount*) v. *Chesham* (*Lady*) (7) has never been overruled, the decision was not regarded by Viscount Birkenhead, L.C., with any great favour. The next case referred to by counsel for the defendant Mrs. Kaye was *Re Parker, Parker* v. *Parkin* (3), to which I have already referred for the statement of the general rule. In that case, the words were [pp. 581, 582]:

> . . . shall be considered as or in the nature of heirlooms and shall pass with my said house in the same manner as if they were land or other real property appendant or appurtenant thereto, and shall accordingly continue annexed to my said mansion house so long as the law will permit, and be inherited or enjoyed by the several persons who shall succeed to my said mansion house under or by virtue of the limitations in my said will and hereinbefore contained respecting the same, and be subject to the rules of law or equity applicable thereto, and in no wise pass under or by any bequest of my personal or residuary estate or effects, but subject nevertheless to reasonable wear and deterioration by use.

In that case, notwithstanding the words "shall accordingly continue annexed to my said mansion house. . . . and be inherited or enjoyed by the several persons who shall succeed to my said mansion house," Parker, J., held that a son who had died in the lifetime of the tenant for life took the chattels. Lastly, counsel for the infant defendant referred me to *Re Lewis, Busk* v. *Lewes* (10), in which the words were [p. 308]:

> . . . "upon trust to permit the same from time to time to go and be held and enjoyed with the said mansion house so far as the rules of law and equity will permit by the person or persons who for the time being shall be entitled to the possession of my real estates . . ."

This was followed by a clause precluding the chattels from vesting absolutely in any tenant in tail by purchase unless he attained 21, but entitling him to the use and benefit thereof during minority. In regard to this case, counsel for the defendant Lady Northbrook relied in argument upon the fact that, under the clause which I have to consider, the proviso "so that the same shall not vest absolutely in any person hereby made tenant in tail by purchase of my said mansion house unless such person shall attain the age of twenty-one years or dying under that age shall leave lawful issue at his or her death" is followed by the words:

> . . . yet nevertheless such tenant shall during his or her respective minority be entitled to the use and enjoyment of all the said chattels and effects.

He pointed out that in *Scarsdale* (*Lord*) v. *Curzon* (2), Sir W. Page Wood, V.-C., referred to those words as being very strong words, but he very rightly referred me to *Re Lewis, Busk* v. *Lewes* (10), because in that case no great importance seems to have been attached to them. For my part, I think that these words must be read as giving the enjoyment to the infant tenant in tail, subject to any life interest which may be subsisting. They do not lead me to the conclusion that there are in this will words reasonably clear and certain making the title to the chattels depend upon actual possession of the mansion house. In *Re Lewis, Busk* v. *Lewes* (10), Astbury, J., after considering a series of authorities, held

that the vesting of the chattels was not postponed until actual possession of the real estate, and that they vested absolutely in the first tenant in tail by purchase when he attained the age of 21 years, although only a remainderman, and, therefore, never in actual possession. That was one of the cases in which *Re Chesham's* (*Lord*) *Settlement,*
A *Valentia* (*Viscount*) v. *Chesham* (*Lady*) (7) was distinguished.

After listening to the very able arguments which have been addressed to me, I feel great doubt as to whether or not this testator intended to make ownership of these chattels dependent upon the tenant in tail coming into actual possession of the estate. That doubt is increased by
B the fact that the word "possession" does not occur in this clause, although the words "actual possession" are used repeatedly in other parts of the will. In those circumstances, applying as best I can the general rule which I have just quoted, which was laid down by PARKER, J., in *Re Parker, Parker* v. *Parkin* (3), I think that it is right
C to decide that Charles, since he became the first tenant in tail by purchase and attained the age of 21 years, became entitled to the heirlooms in question. I should mention, however, that counsel for the defendant Lady Northbrook was prepared to contend that there was no effective disposition of the chattels at all by this clause, on certain grounds
D which he was prepared to put before me in argument. If that were so, the chattels in question would fall into the gift of residue. However, by the time he came to put his argument, I had heard all the arguments on the question of whether or not Charles became entitled to these heirlooms, and counsel said that he did not desire
E to add to those arguments, and I thought it fair to him to intimate the view which I have just stated. On that, counsel informed me that all his arguments in favour of the chattels falling into residue were dependent upon the proposition that Charles could not take unless he survived his father, and that, that being so, he did not think it right
F to put those arguments before me.

Solicitors: *Evelyn Jones & Co.*, agents for *Jackson & Sons*, Ringwood (for the plaintiff and for all the defendants other than the infant defendant); *Baileys, Shaw & Gillett* (for the infant defendant).

[*Reported by* CHARLES NEWTON, ESQ., *Barrister-at-Law.*]

R. *v.* ARMY COUNCIL, *Ex parte* SANDFORD.

[Court of Appeal (Slesser, Luxmoore and Goddard, L.JJ.), **March 13, 1940.**]

Royal Forces—Army—Conviction by court-martial—Confirmation by Army Council—Jurisdiction of Court of Appeal—"Criminal cause or matter"—Army Act, s. 57 (2)*—Supreme Court of Judicature (Consolidation) Act,* A
1925 (*c.* 49), *s.* 31 (1) (*a*).

The appellant was convicted on five charges of felony before a court-martial, and sentence of dismissal from the service was promulgated on Mar. 5, 1934. In May, 1934, the Army Council, having reviewed the proceedings at the appellant's request, quashed the convictions on four of the charges, but did not mitigate, remit or commute the sentence in B
view of the serious nature of the remaining charge. A motion for a writ of *mandamus* that the Army Council be commanded to mitigate, remit or commute the sentence so passed upon the appellant was dismissed in the King's Bench Division. A preliminary objection to an appeal against that decision was taken, and it was contended that, although the proceedings before the court-martial were in the nature of a criminal cause or matter, the consideration of the matter by the C
Army Council and their decision thereon were not:—

Held: the decision of the Army Council was a decision in a criminal matter, and the Court of Appeal had, therefore, no jurisdiction to hear the appeal.

[EDITORIAL NOTE. In the case of a criminal cause or matter, the decision of the Divisional Court is final. The contention here is that the Army Council, in D
reviewing sentences, does not act as a court or a judicial body, but merely performs a statutory duty, and that, therefore, the decision could not be one in a criminal cause or matter.

As to Criminal Cause or Matter, see HALSBURY, Hailsham Edn., Vol. 9, pp. 740, 741, paras. 1261, 1262; and for Cases, see DIGEST, Vol. 14, pp. 551-554, Nos. 6271-6298.] E

Cases referred to:

(1) *Re Clifford & O'Sullivan*, [1921] 2 A.C. 570; 39 Digest 341, *269*; 90 L.J.P.C. 244; 126 L.T. 97.

(2) *R.* v. *Board of Education*, [1910] 2 K.B. 165; 42 Digest 614, *141*; 79 L.J.K.B. 595; *sub nom. R.* v. *Board of Education, Ex p. Swansea, Oxford Street (Church of England) School Managers*, 102 L.T. 578; *affd. sub nom. Board of Education* v. *Rice*, [1911] A.C. 179. F

(3) *R.* v. *Fletcher* (1876), 2 Q.B.D. 43; 14 Digest 553, *6285*; 46 L.J.M.C. 4; 35 L.T. 538.

(4) *R.* v. *Garrett, Ex p. Sharf*, [1917] 2 K.B. 99; 14 Digest 553, *6287*; 86 L.J.K.B. 894; 116 L.T. 398.

G

Appeal by the applicant from an order of the King's Bench Divisional Court, dated Oct. 19, 1939, and reported [1939] 4 All E.R. 102. The facts are fully set out in the judgment of Slesser, L.J., but, for the purposes of this appeal, are of secondary importance, the only question being whether the court had jurisdiction to hear the appeal at all. H
Giving judgment in the Divisional Court, Lord Hewart, L.C.J., dealt with the merits of the application for a *mandamus*, and dismissed the motion, holding that it depended on fundamental errors of construction of the relevant section of the Army Act. The applicant appealed, and on the appeal the Attorney-General took the preliminary objection that

the Court of Appeal had no jurisdiction, because the appeal was from a judgment of the High Court in a criminal cause or matter.

D. N. Pritt, K.C., and *S. A. Kyffin* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the respondents.

SLESSER, L.J.: This is an appeal from an order of the Divisional Court, dated Oct. 19, 1939, dismissing a motion by Herbert Ronald Sandford:

> . . . for an order of *mandamus* that the Army Council be commanded, according to law, to mitigate, remit or commute a sentence promulgated on Mar. 5, 1934, whereby the said applicant was dismissed the service His Majesty's Army in India upon the grounds set forth in the copy statement served herewith, used on the application for leave to issue this notice of motion.

On this appeal being brought before the present court, by way of preliminary objection the Attorney-General takes the point that this court, having regard to the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*a*), has no jurisdiction to hear this appeal, because it is an appeal from a judgment of the High Court in a criminal cause or matter.

The case which came before the Divisional Court arose out of certain charges of forging documents with intent to defraud, and three charges of uttering forged documents knowing the same to be forged with intent to defraud brought against Ronald Sandford and tried between Jan. 8, 1934, and Jan. 29, 1934, by a general court-martial held at Quetta and Karachi on those five charges under the Army Act, s. 41. At that time, Sandford was a Lieutenant-Colonel in the Royal Engineers in the Army in India. He was found guilty of the charges. The findings were duly confirmed, and by sentence promulgated on Mar. 5, 1934, he was dismissed the service. On May 2, 1934, he petitioned the Army Council to review the proceedings which had taken place before the court-martial, and the Army Council duly reviewed the proceedings. They decided that the convictions on the first, second, fourth and fifth charges should be quashed, that "all record of the convictions on those charges is to be erased," and that Sandford was to be relieved of the consequences of the convictions. I read from the intimation sent to Sandford on July 19, 1934, on behalf of the Army Council, which continues as follows:

> In view of the nature of the third charge upon which the conviction stands, the Army Council can see no ground for interfering with the sentence passed by the court, and the necessary notification will be published in the *London Gazette* of Aug. 3, 1934.

In substance, Sandford says that the Army Council had no power to come to that conclusion, having quashed the other charges. However, in so far as we have come to the conclusion that there is no jurisdiction to deal with this matter by way of appeal, it is unnecessary, and it would be improper, to express any opinion on the merits of Sandford's contention. I mention these facts only in order that the matter of jurisdiction, which we have here to consider, may appear clear.

Counsel for Sandford concedes that the proceedings before the court-martial were themselves certainly in the nature of a criminal cause or matter. If authority be needed for that, which I have said counsel for the appellant concedes, it is to be found both in the opinion of A VISCOUNT CAVE and in that of LORD SUMNER in *Re Clifford & O'Sullivan* (1). He contends, however, that the proceedings of the Army Council here in question were not criminal proceedings, so that any matters affecting those proceedings by way of *mandamus* would not be themselves proceedings in a criminal cause or matter. On this B point also a number of authorities have established beyond question that matters such as prohibition, *certiorari* and *mandamus* in relation to causes or matters which are criminal are themselves criminal causes or matters, excluding this court from exercising appellate jurisdiction. That principle is not only to be found in the observations in the House C of Lords in *Re Clifford & O'Sullivan* (1), but is also affirmatively established in a number of authorities which have been cited to us.

The real question we have here to consider is whether or not these proceedings before the Army Council, which were by way of petition, were themselves a criminal proceeding and raised questions of criminal D matters to be determined. As has been pointed out to us, the jurisdiction of the Army Council to deal with these matters arises from two separate sources. First of all, there is the question whether or not the proceedings, as such, shall be quashed. The power of the Army Council to deal with that matter is derived from the King's Regulations, which are them- E selves promulgated by the authority of the King's prerogative, more particularly in reg. 681. That matter seems to me, so far, clearly and without any question a criminal matter. The Army Council have to consider whether convictions before a court-martial are illegal or involve substantial injustice to the accused, and the findings and sentence are F varied or mitigated, as the regulation itself says, by quashing the findings or by reduction of the sentence. The consequential remedy, when it is thought remedy should be given, is a matter dealing with the proceedings of the court-martial. The rules, which I need not read, but which are in reg. 681, are expressly said to apply when the proceedings of a G court-martial, after confirmation, come under the review of any of the authorities specified in the Army Act, s. 57 (2). That section, which is thus imported into the prerogative regulations, also gives specific power to the authority, here the Army Council, for it provides as follows:

H

> When a sentence passed by a court-martial has been confirmed, the following authorities shall have power to mitigate or remit the punishment thereby awarded, or to commute such punishment for any less punishment or punishments to which the offender might have been sentenced by the said court-martial . . .

It is clear to my mind that, whereas it might conceivably be argued that the remission of a sentence was not itself necessarily a judicial act—an illustration has been given of the exercise of His Majesty's prerogative on the advice of the Home Secretary in the case of a person convicted—the language here extends to dealing with the punishment itself. It is to mitigate, or remit, or commute such punishment. It appears to me, therefore, that the competent authority dealing with this matter is as much exercising judicial functions in this aspect as is the Court of Criminal Appeal when it is called upon to reduce the punishment which has been awarded by the criminal judicial authority. It is said by counsel for the appellant that the Army Council is not a court, but the question is not whether or not it is a court in any narrow sense of the word. The question is whether or not the decision of the Army Council is a decision in a criminal cause or matter. If it be a decision in a criminal matter, we have no jurisdiction. In civil cases, bodies, not being specifically courts or tribunals, very frequently exercise judicial or quasi-judicial functions. *R.* v. *Board of Education* (2) and cases against the Ministry of Health have abundantly displayed that principle, and in such cases those quasi-judicial functions are generally exercised civilly. It is a question of law, however, whether it is exercised civilly or criminally, and, if the right view be that the tribunal is vested with criminal jurisdiction which is of a judicial or quasi-judicial nature, then any matter affecting the exercise of that jurisdiction by prerogative writ, *mandamus*, *certiorari* or prohibition is similarly, on the authorities, a proceeding in a criminal cause of matter.

I would only add that something has been said in regard to the fact that the Army Council derives part of its power from the prerogative and part from statute. I do not think that that matter is decisive of the question in any way. There are many tribunals exercising criminal jurisdiction in this country which derive their authority originally from the common law, prerogative or charter, and not from statute. Many of their powers were derived, indeed, before the adoption of the present method of promulgating edicts by Parliament. The question is whether or not the body is exercising a criminal function. In my opinion, the Army Council, in considering whether or not it will commute a sentence under the statute, or whether or not it will quash charges under the prerogative, is in both cases acting in a criminal cause or matter.

Finally, I would say only that this case seems to me entirely different from that of the so-called military court which fell for consideration in *Re Clifford & O'Sullivan* (1). It was pointed out by VISCOUNT CAVE in that case, at p. 581, that it was:

> . . . a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands contained in the proclamation, and of advising him as to the manner in which he should deal with the offences; and its "sentences," if confirmed, will derive their force not from the decision of the military court, but from the authority of the officer commanding His Majesty's forces in the field.

On that principle, the so-called military court in that case was held (LORD SUMNER dissenting) not to be a court or judicial tribunal. Here, however, there is no question but that the court-martial was performing its ordinary criminal functions under the Army Act, and, as I have said, the Army Council, which has the duty of supervising and remitting in the case of offences, and of considering whether or not it will quash the sentence in the case of conviction, is performing a function as a superior body analogous to that which the court-martial itself, admittedly acting in a criminal cause or matter, performed. For this reason, I think that this preliminary point succeeds, and that this court has no jurisdiction to entertain the appeal.

Luxmoore, L.J.: I entirely agree with the judgment which has just been delivered, and do not think it necessary to add anything.

Goddard, L.J.: In my opinion, it is desirable to keep as strictly to the facts of this case brought before us as one can. I take the definition of a criminal cause or matter from the opinion of Viscount Cave in *Re Clifford & O'Sullivan* (1), at p. 580:

> It must involve the consideration of some charge of crime, that is to say, of an offence against the public law (Imperial Dictionary, tit. "Crime" and "Criminal"); and that charge must have been preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it (see *R.* v. *Fletcher* (3), *per* Amphlett, J.A., and *R.* v. *Garrett, Ex p. Sharf* (4), *per* Bankes, L.J.), but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction.

In the same case, Viscount Cave showed that a court-martial was a court for this purpose. Here we have a charge of felony preferred against the applicant for the rule (the appellant in this case), and that charge was preferred before a court-martial, which was a judicial tribunal having jurisdiction to impose punishment. The court-martial having convicted and sentenced the appellant, the case came, under the Army Act, s. 57, before the confirming authority, who confirmed it. That sentence having been confirmed, the Army Act, s. 57 (2), confers on the Army Council a power to mitigate, or remit, or commute the sentence. When the matter was brought before the Army Council in the manner provided by the King's Regulations—which for this purpose are analogous to the rules of the court—the Army Council then had to consider whether or not it would mitigate, remit, or commute, and it came to a decision upon the matter. I cannot see why, in those circumstances, the Army Council was not acting as a court just as much as the original court-martial. They were both performing duties imposed upon them by the Army Act. The Army Council was acting as a court, and consequently this is a criminal cause or matter within the authorities, and this court has no jurisdiction to entertain an appeal.

Appeal dismissed with costs upon the preliminary objection to jurisdiction.

Solicitors: *Henry Mossop & Syms* (for the appellant); *Treasury Solicitor* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

POOLEY *v.* BRYNING.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., and Goddard, L.J.), **March 19, April 10, 1940.**]

Practice—Action commenced in district registry—Defendant's right to have proceedings removed to London—R.S.C., Ord. 5, *rr.* 1, 2—*R.S.C., Ord.* 12, *rr.* 4, 6, 7—*R.S.C., Ord.* 35, *rr.* 13, 14, 15, 16, 17—*R.S.C., Ord.* 36, *rr.* 1, 10.

The plaintiff commenced this action in a district registry. The defendant gave notice under R.S.C., Ord. 35, r. 14, that he desired the action to be removed to London. The plaintiff then applied for the action to be retransferred to the district registry, and an order was made to that effect. The ground for the application was that the parties and all the witnesses resided within the district:—

HELD: the words "other good cause" in R.S.C., Ord. 35, r. 14, cannot be construed *ejusdem generis* with the remainder of the rule. Merely to show facts which would be a good ground for fixing the trial within the district of the registry is not sufficient to deprive a defendant of the right given by R.S.C., Ord. 35, rr. 13, 14, to have the action removed to London. Something more is necessary, as, for instance, that expense will be saved or that some hardship will be caused to the plaintiff.

[**EDITORIAL NOTE.** Under R.S.C., Ord. 35, r. 13, the defendant is given a right to remove an action from the district registry to London. This right, in the case of a substantial defendant, is absolute, and the removal is complete upon his giving the requisite notice. The plaintiff, however, has a right to apply that the action may remain in the district registry notwithstanding the notice. The removal will only mean that the interlocutory matters will be dealt with in London. The trial will be at the Assizes unless a further order is made. To avoid the removal the plaintiff must show that the removal to London will place some hardship on him.

AS TO TRANSFER OF ACTION TO LONDON, see HALSBURY, Hailsham Edn., Vol. 26, p. 47, para. 73; and FOR CASES, see DIGEST, Practice, p. 530, Nos. 1950-1952. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 575, 576.]

Cases referred to:

(1) *Smelting Co. of Australia* v. *Inland Revenue Comrs.*, [1897] 1 Q.B. 175; 36 Digest 676, *1577*; 66 L.J.Q.B. 137; 75 L.T. 534.

(2) *Walker* v. *Crabtree*, [1883] W.N. 197; Digest, Practice, 530, *1952*.

(3) *Smith* v. *Bell*, [1883] W.N. 196; Digest, Practice, 530, *1951*.

APPEAL by the defendant from an order of MACNAGHTEN, J., dated Feb. 27, 1940, refusing to set aside an order of Master SIMNER, dated Feb. 2, 1940, ordering that the action be transferred to the Manchester District Registry. The notice of appeal asked that the order should be rescinded and that the action should proceed in London. The writ in the action was issued in the Manchester District Registry. The defendant gave notice, and thereby the action was transferred to London. The plaintiff, however, obtained an order retransferring the action to Manchester, and it was from that order that this appeal was brought.

R.S.C., Ord. 35, rr. 13, 14, provide as follows:

> 13. In any action which would, under the foregoing rules, proceed in the district registry, the action may, subject to r. 14, be removed from the district registry as of right in the cases and within the times following: (1) Where the writ is specially indorsed under R.S.C., Ord. 3, r. 6, and the plaintiff does not within 4 days after the appearance of such defendant give notice of an application for an order against him under R.S.C., Ord. 14; then such defendant may remove the action as of right at any time after the expiration of such 4 days, and before delivering a defence, and before the expiration of the time for doing so: (2) Where the writ is specially indorsed and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend in manner provided by R.S.C., Ord. 14; then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence and before the expiration of the time for doing so: (3) Where the writ is not specially indorsed under R.S.C., Ord. 3, r. 6, any defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so: (4) In an Admiralty action *in rem*, any person who may have duly intervened and appeared may remove an action from a district registry as of right.
>
> 14. Any party or person desirous to remove an action as of right under the last preceding rule may do so by serving upon the other parties to the action, and delivering to the district registrar, a notice, signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action shall be removed accordingly: Provided, that if the court or a judge shall be satisfied that the defendant giving such notice is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, or that there is other good cause for proceeding in the district registry, such court or judge may order that the action may proceed in the district registry notwithstanding such notice.

J. F. F. Platts Mills for the appellant.

A. Melford Stevenson for the respondent.

Platts Mills: The judge took the view that, on the balance of convenience, the action should proceed in the district registry, but balance of convenience is not the test. The only issue was whether or not the plaintiff could show " good cause " within the meaning of R.S.C., Ord. 35, r. 14. What amounts to " good cause " must be determined by comparing r. 14 with rr. 16 and 17. Those rules speak of " sufficient reason." The whole scheme of the rules in this part of the order must be followed. The defendant has a right to have the action removed, and not merely a right to make an application. The words " good cause " cannot be extended to mean any cause whatever. If the legislature had intended that, some indication of the fact would have been given. The legislature has said that the court may make an order to retransfer the action for any sufficient cause within r. 14 and its proviso. The proviso limits the meaning of " good cause." The admission by the defendant that the action is one for trial at Manchester cannot possibly be " good cause " within the meaning of the rule. I rely upon the test placed upon the words by Field, J., in *Walker* v. *Crabtree* (2). There is no evidence that the plaintiff would suffer any hardship by the action proceeding in London. [Counsel referred to *Smith* v. *Bell* (3).]

Stevenson : The judge was satisfied in fact, and, therefore, it is not open to the appellant to challenge the matter. A possible explanation of the words "as of right" in R.S.C., Ord. 35, r. 14, is that they are intended to make it clear that an action can be transferred from a district registry to London by the service of a notice. The right, however, is subject to the proviso in r. 14.

Goddard, L.J. [delivering the judgment of the court]: This is an appeal from an order of Macnaghten, J., in chambers, dismissing an appeal from a master who has ordered that the action should be transferred from London to the Manchester District Registry. The application to the master was made under R.S.C., Ord. 35, r. 14, and the point of the appeal is as to the meaning to be attributed to the words "other good cause" in that rule. There is but little authority on the matter, and it does not appear ever before to have been considered in this court, although the rule has been in existence at least since 1883. The parties to the action both live in the district of the Manchester District Registry, out of which the writ was issued. The defendant accordingly was obliged, by R.S.C., Ord. 12, r. 4, to appear in the registry, and, having appeared, he served notice under R.S.C., Ord. 35, r. 14, that he desired the action to be removed to London. The action was thus removed, as, once the notice is served, the removal is automatic. The plaintiff then applied under the proviso to the rule for a transfer to the Manchester District Registry. The master made an order in those terms, though in strictness it should have been that the action should proceed in the district registry notwithstanding such notice.

On the hearing of the summons, the only evidence was an affidavit setting out in substance that the parties and all the witnesses resided within the district. It was in fact just the sort of affidavit which would be filed had it been desired to alter, under R.S.C., Ord. 36, r. 1, the place of a trial which had already been fixed. There is no suggestion that any place other than Manchester should be the venue, and we were informed that, when counsel for the defendant told the judge that it was conceded that Manchester was the proper place for trial, the judge made the order now under appeal. If there was material upon which the judge could thus exercise his discretion, we should not consider that in this case it would be right to interfere. The question is, however, whether the fact that the parties and all the witnesses live within the district, without more, is good cause for depriving the defendant of his right to have the action proceed in London, although the trial must be in Manchester.

It is necessary to consider briefly the various orders dealing with proceedings in district registries. Under the combined effect of R.S.C., Ord. 5,

rr. 1 and 2, a plaintiff can issue his writ out of any district registry he pleases or out of the Central Office. Under R.S.C., Ord. 12, r. 4, if the defendant resides or carries on business within the district of the registry out of which the writ is issued, he must appear in that registry. If he does not, he can appear either in the registry or in the Central Office. If he elects to appear in the latter, the action proceeds in London. A
If he appears locally, r. 6 provides that the action shall proceed in the registry, but this is expressly subject to the power of removal conferred by R.S.C., Ord. 35, rr. 13-16. R.S.C., Ord. 35, r. 13, provides that, subject to r. 14, an action may be removed to London as of right, but it is clear from the words of the rule that it is only a defendant, or one of B
the defendants, who has this right of removal. Rule 14 provides for the removal by serving a notice, but it is also provided that, if the court is satisfied that a defendant who gives such a notice is merely a formal defendant, or has no substantial cause to interfere in the conduct of the action, or that there is other good cause for proceeding in the district C
registry, the court may order the action to proceed in the registry notwithstanding such notice.

The first contention of counsel for the appellant was that the court should apply to this rule the rule of construction generally known as *ejusdem generis*, so that the meaning of the words "other good cause" D
must be limited to considerations affecting the defendant's real interest in the suit. In support of this argument, he called attention to r. 16, which deals with the removal of matters not provided for in rr. 13 and 14 —as, for instance, originating summonses—and to r. 17, which provides for the converse case of removal from London to a district registry, E
neither of which contains any reference to the nature of the defendant's interest in the suit. He also referred to R.S.C., Ord. 12, r. 7, which provides that, if a defendant appears in London, the action shall proceed there, but provides for transfer to the district registry if a defendant who has appeared in London has no real interest in the suit. In this F
rule, there is no mention of any other good cause. The combined effect of R.S.C., Ord. 12, r. 7, and R.S.C., Ord. 35, r. 17, is to give a plaintiff a right to apply for a transfer from London to a district registry on any ground. However, he has to satisfy the court that there is sufficient reason for doing so. He cannot do it as of right, and terms may be G
imposed upon him as a condition of transfer, except where the ground is lack of substantial interest in the suit on the part of the defendant. We do not think, however, that it would be right to put a limited construction on the words "other good cause." The rule of construction which is called the *ejusdem generis* rule, or sometimes the H
doctrine *noscitur a sociis*, is one which ought to be applied with great caution, because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have

been the intention of the legislature, as was said by RIGBY, L.J., in *Smelting Co. of Australia* v. *Inland Revenue Comrs.* (1), at p. 182. We can conceive of many cases where it would or might be a real hardship on a poor plaintiff to have the case removed to the Central Office, so that all the interlocutory matters had to take place in London. Each case A must be decided on its own particular facts. However, it still remains to be considered whether facts which point, and point clearly, to the area of the district registry as the appropriate venue for trial are sufficient, without more, to deprive the defendant of the privilege, given to him by the rule, of having the case removed to London for all purposes other B than trial—a privilege which, it is to be noticed, is given as of right. If the proviso gives the court authority to deprive the defendant of this right merely on what, when considering venue, is called the balance of convenience, it would seem that the privilege is more apparent than real. If a defendant who has an option chooses to appear in the district C registry, he does so presumably because he wishes the case to proceed there. He may, no doubt, change his mind. The question is far more likely to arise, however, where he is bound to appear in the registry, and yet may wish the case to proceed in London. In the great majority of cases where a writ is issued from a district registry against a defendant D living in that district, the case will naturally be what may be called a local case. If that fact is to be a good cause for depriving him of the right to remove the case to London, it is difficult to see the object of giving him this right. The rule does not require him to show a good ground for removal. We can well imagine the case of an action brought against E a landowner who lives in the area of a district registry in respect of property situate also within that district. It may well be that his affairs have always been in the hands of London solicitors, whom he would desire to conduct the action. He could then exercise the right, although all the witnesses as well as the parties live in the district of the registry. F The convenience of the parties and their witnesses, and the date at which a trial can be had, and such matters, are all, by R.S.C., Ord. 36, r. 10, to be taken into account when fixing the place of trial, but there are no such provisions in the rule which we are now considering.

In our opinion, it is not sufficient to deprive a defendant of the right G given to him by R.S.C., Ord. 35, rr. 13, 14, merely to show facts which would be a good ground for fixing the trial within the district of the registry. Something more—as, for instance, that expense will be saved, or that it can be shown that some hardship will be caused to the plaintiff—is required. We do not say that questions of convenience are to be H entirely ruled out. They might, in a doubtful case, turn the scale. By themselves, however, they are not enough. The only authority to be found on this matter is *Walker* v. *Crabtree* (2). That was a case decided by FIELD, J., during the period when he was sitting in chambers for

the purpose of settling the practice under the new rules. It appears to us that he was invited to apply the *ejusdem generis* rule and declined to do so, but at the same time he refused to deprive the defendant of his right of removal in spite of considerations not at all unlike those which arise in this case. He seems, therefore, to have arrived at the same conclusion as to the meaning of the rule as that at which we have arrived. A
The result is that the appeal is allowed and the order of the judge and that of the master will be discharged. The costs here and below will be the defendant's in any event.

Appeal allowed with costs.

Solicitors: *R. I. Lewis & Co.* (for the appellant); *Sharpe, Pritchard* B
& Co., agents for *Pickstone & King*, Radcliffe (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

NOBLE *v.* SOUTHERN RAILWAY CO.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **March 5, 6, 7, April 18, 1940.**]

Workmen's Compensation—Accident arising out of employment—Railway employee killed while walking along line—Forbidden route—Whether act done for purposes of employers' business—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (2).

The deceased, a fireman employed by the respondents, was ordered to proceed from an engine-shed to a railway station. The permitted routes for this journey did not involve walking along the railway lines, and several warnings had been issued by the respondents to their staff forbidding them to walk along the lines unless they were required so to do in the execution of their duty, or unless they were using a permitted route. The deceased proceeded to walk along the lines, and was killed by a train :—

HELD : as the evidence established that the deceased was acting for the purposes of, and in connection with, his employers' trade or business, and was acting within the sphere of his employment, the accident must be deemed to have arisen out of and in the course of his employment, although the act was in contravention of the employers' rule. The widow was, therefore, entitled to recover compensation.

Clarke v. *Southern Ry. Co.* (1) *overruled.*

Order of Court of Appeal ([1939] 2 All E.R. 817) *reversed.*

[**EDITORIAL NOTE.** To those acquainted with the many decisions under the Workmen's Compensation Act, 1925, s. 1 (2), it will be sufficient to say that this decision removes the difficulty created by the presence among those decisions of the case of *Clarke* v. *Southern Ry. Co.* (1), where the facts were very similar to those in the present case. The House of Lords, though not expressing a decided opinion, appears to have been inclined to think that the Court of Appeal might have held that the decision in *Clarke's* case (1) was inconsistent with later cases in the House of Lords and have declined to follow its own decision. If the Court of Appeal had done so, the position would not have been clarified by the opinions of their Lordships in the present case. In the case of death or serious and permanent injury, an accident may arise out of and in the course of the employment even though the man is acting in disobedience to regulations or orders. This is still the case even where the doing of the prohibited act involves an added peril to the man's occupation, but, on the other hand, the man must not do something outside the sphere of his employment, and he must be acting for the purposes of, and in connection with, the employer's trade or business. In the course of his opinion, LORD ATKIN approves the judgments in the recent decision of the Court of Appeal in *Seviour* v. *Somerset Collieries, Ltd.* (10).

AS TO RELIEF UNDER SECTION 1 (2) OF THE ACT, see WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 69-83 ; and FOR CASES, see DIGEST, Vol. 34, pp. 299-301, Nos. 2487-2497.]

Cases referred to :

(1) *Clarke* v. *Southern Ry. Co.* (1927), 96 L.J.K.B. 572 ; Digest Supp. ; 137 L.T. 200 ; 20 B.W.C.C. 309.

(2) *Thomas* v. *Ocean Coal Co., Ltd.* [1933] A.C. 100 ; Digest Supp. ; 102 L.J.K.B. 142 ; 148 L.T. 219 ; 25 B.W.C.C. 436.

(3) *Moore (A. G.) & Co.* v. *Donnelly, Fife Coal Co.* v. *Sharpe, Fife Coal Co.* v. *Fyfe*, [1921] 1 A.C. 329 ; 34 Digest 302, *2501* ; 90 L.J.P.C. 49 ; 124 L.T. 578 ; 13 B.W.C.C. 458.

(4) *Wilsons & Clyde Coal Co.* v. *M'Ferrin, Kerr* v. *Dunlop (James) & Co.*, [1926] A.C. 377; 34 Digest 301, *2499*; 95 L.J.P.C. 130; 135 L.T. 164; 19 B.W.C.C. 1; *affg.* S.C. *sub nom. McFerrin* v. *Wilsons & Clyde Coal Co., Ltd., M'Aulay* v. *Dunlop (James) & Co., Ltd.*, 18 B.W.C.C. 630, 680.

(5) *Victoria Spinning Co. (Rochdale), Ltd.* v. *Matthews*, [1936] 2 All E.R. 1359; Digest Supp.; 105 L.J.K.B. 521; 155 L.T. 363; 29 B.W.C.C. 242.

(6) *Lancashire & Yorkshire Ry. Co.* v. *Highley*, [1917] A.C. 352; 34 Digest 290, *2425*; 86 L.J.K.B. 715; 116 L.T. 767; 10 B.W.C.C. 241; *revsg.* (1916), 85 L.J.K.B. 1513. A

(7) *Harris* v. *Associated Portland Cement Manufacturers, Ltd.*, [1939] A.C. 71; [1938] 4 All E.R. 831; Digest Supp.; 108 L.J.K.B. 145; 160 L.T. 187; 31 B.W.C.C. 434.

(8) *Davies* v. *Gwauncaegurwen Colliery*, [1924] 2 K.B. 651; 34 Digest 313, *2572*; 94 L.J.K.B. 229; 132 L.T. 221; 17 B.W.C.C. 181. B

(9) *Stokoe* v. *Mickley Coal Co., Ltd.* (1928), 138 L.T. 566; Digest Supp.; 21 B.W.C.C. 70.

(10) *Seviour* v. *Somerset Collieries, Ltd.*, [1940] 1 All E.R. 649; Digest Supp.

(11) *Stephen* v. *Cooper*, [1929] A.C. 570; Digest Supp.,; 98 L.J.P.C. 97; 141 L.T. 300; 22 B.W.C.C. 339. C

(12) *Knowles* v. *Southern Ry. Co.*, [1937] A.C. 463; [1937] 2 All E.R. 403; Digest Supp.; 106 L.J.K.B. 339; 156 L.T. 461; 30 B.W.C.C. 76.

(13) *Barnes* v. *Nunnery Colliery Co., Ltd.*, [1912] A.C. 44; 34 Digest 299, *2489*; 81 L.J.K.B. 213; 105 L.T. 961; 5 B.W.C.C. 195.

(14) *Plumb* v. *Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62; 34 Digest 288, *2415*; 83 L.J.K.B. 197; 109 L.T. 759; 7 B.W.C.C. 1. D

(15) *St. Helens Colliery Co., Ltd.* v. *Hewitson*, [1924] A.C. 59; 34 Digest, 280, *2364*; 93 L.J.K.B. 177; 130 L.T. 291; 16 B.W.C.C. 230.

(16) *Dennis* v. *White (A. J.) & Co.*, [1917] A.C. 479; 34 Digest 321, *2627*; 86 L.J.K.B. 1074; 116 L.T. 774; 10 B.W.C.C. 280; *revsg.*, [1916] 2 K.B. 1

APPEAL from an order of the Court of Appeal (MACKINNON and LUXMOORE, L.JJ., and MACNAGHTEN, J.), dated May 15, 1939, and reported [1939] 2 All E.R. 817, affirming an award made by His Honour JUDGE SIR GERALD HURST, K.C., at the Croydon County Court, dated Mar. 17, 1939. The facts are fully set out in the opinion of LORD PORTER. E F

F. W. Beney and *Neil Lawson* for the appellant.

A. T. Denning, K.C., and *W. H. Duckworth* for the respondents.

VISCOUNT MAUGHAM: My Lords, the husband of the appellant, Thomas Noble, was killed on Aug. 25, 1938, by an electric train. He was G in the employment of the respondents as a "passed fireman," but he was still graded as a fireman. He was 37 years old, had been attached to the locomotive depot at Norwood Junction since Mar., 1936, and was, in fact, employed on "piloting duties," meaning that, when a driver was not acquainted with the railroad, he had to travel in the engine H cab and show it to him.

About midnight of Aug. 24, 1938, he reported at the engine shed, part of the locomotive depot, and was then told to go to East Croydon, travelling as a passenger from Norwood Junction station by a train due to leave at 12.25 a.m. To catch that train he had to walk to the junction station. There is a recognised route to that place, which has been specified as the right way since the locomotive depot was opened in July, 1925. It is along a footpath on the respondents' property, then over a footbridge on to another footpath, then along Penge Road, over Goat House Bridge, along the High Street, Portland Road and a further footpath. This somewhat devious route is adequately lighted at night, and is almost perfectly safe. The total distance is 1,002 yds. There is, however, a short cut along the lines of the railway, the total distance of which is 841 yds. This direct route is dangerous, because of the presence of point rods, elevated live rails, various obstructions, and electric trains passing in both directions. It is very dangerous at night, as it is not lighted. Its use by employees of the respondents (unless they are required to use it in the execution of their duty) is strictly prohibited. Moreover, a notice had been issued specifying the exact route which had to be taken between the junction station and the locomotive depot.

Thomas Noble unhappily took the direct route along the rails, and he was killed at 12.14 a.m. or 12.15 a.m. by an electric train coming up behind him. The night was a dark one. He was struck at a point 242 yds. from the locomotive shed, and was carried along the track to a point 312 yds. from the shed, at which point his body was recovered. The award makes it quite clear that when he was killed he had departed from the recognised and safe route, and was walking along the highly dangerous route between, or in close proximity to, the rails used by the electric trains. In that sense, he was in a place where the respondents had expressly forbidden him to go. In order to appreciate the problem before your Lordships, it is necessary to state that the workman was doing a prohibited act, involving an added risk, in a place where he was, by the prohibition, forbidden to go.

The arbitrator in his award has made a clear and exhaustive statement of the relevant facts. Unfortunately, he appears—and, if I may say so, very naturally—to have lost his way a little in the jungle of decisions on the construction and effect of the Workmen's Compensation Act, 1925, s. 1 (2). Moreover, a decision of the Court of Appeal in *Clarke* v. *Southern Ry. Co.* (1), the facts of which were really indistinguishable from those of the present case, compelled him, as I think, to hold that sect. 1 (2) did not avail the workman. His award was accordingly in favour of the respondents. In the Court of Appeal, MacKinnon and Luxmoore, L.JJ., with some reluctance came to the conclusion that they were bound by the decision in *Clarke's* case (1), while Macnaghten, J., also thought that, according to the award, the appellant had failed to prove that Noble went along the permanent way where he was killed for any purpose of the respondents. I will return to this question of fact later on.

My Lords, there are over 50 decisions which deal with problems very similar to the one with which we are dealing, including not less than

10 decisions of this House. We are, of course, bound by the latter, so far as they decide questions as to the construction of the Act of Parliament, but there are *dicta*, sometimes difficult to reconcile, by which we are not bound. It must also be remembered that each case depends on the findings of the arbitrator, which are binding unless it is shown that he has misdirected himself in some material matter, or unless there is no evidence to justify his finding. For my part, I am very reluctant to go outside the terms of sect. 1 of the Act, with the exception that I think the history of subsect. (2) must be borne in mind. That history is to be found stated in this House in *Thomas* v. *Ocean Coal Co., Ltd.* (2), at pp. 124, 127, and I will not repeat it. It is plain that the object of sect. 7 of the Act of 1923 (which was in the same language as sect. 1 (2) of the Act of 1925) was to enable workmen and their dependants to obtain compensation in the case of injuries resulting in death or serious and permanent disablement (but not in other cases), although they would have failed to do so according to the decision of this House in *Moore (A. G.) & Co.* v. *Donnelly* (3). The method adopted by the legislature was, not to alter the ruling in *Donnelly's* case (3), but to provide that in certain cases the accident shall be *deemed to have arisen* out of and in the course of the workman's employment. If this is so, the result is to make the employer liable under sect. 1, subject only to the proviso, which we need not consider in this case. Subsect. (2) merely provides an artificial extension of the actual scope of employment of the workman in the particular circumstances mentioned, and subject to the special condition that the act which was being done at the time of the accident was done for the purposes of, and in connection with, not the workman's job, but his employer's trade or business. In saying this, I am only repeating in my own words what VISCOUNT DUNEDIN stated in *Wilsons & Clyde Coal Co.* v. *M'Ferrin* (4), at pp. 386, 387. The subsection has, I think, no application unless the workman, when the accident happened, was acting in contravention :

> . . . of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer . . .

For brevity, I shall describe that phrase as " regulations or orders." This is clear from the history of the subsection and from the use of the word " notwithstanding," which in its context explains the object of it. I may perhaps add here that I agree with the explanation by VISCOUNT DUNEDIN of the words relating to the man " acting without instructions from his employer "—namely, that they were meant to apply to a case where it might be argued that the prohibition was an implied prohibition : see *Wilsons & Clyde Coal Co.* v. *M'Ferrin* (4), at p. 386.

In my opinion, we are compelled by the section in such a case as the present, where death has resulted from the accident, and no serious and wilful misconduct is alleged, to answer the following questions. First, looking at the facts proved as a whole, including any regulations or orders affecting the workman, was the accident one which arose out of and in the course of his employment? Secondly, if the first question is answered in the negative, is the negative answer due to the fact that, when the accident happened, the workman was acting in contravention of some regulation or order? Thirdly, if the second question is answered in the affirmative, was the act which the workman was engaged in performing done by the workman for the purposes of, and in connection with, his employer's trade or business?

My Lords, in the light of the recent decisions of this House, it seems to be clear that there are no tests of universal application which will give material assistance in answering these questions of fact—questions which ought, of course, to be answered in the award. What has been described as the doctrine of "added peril" was, I think, not the *ratio decidendi* in any decision of this House. I agree with what Lord Buckmaster said about it in *Thomas* v. *Ocean Coal Co., Ltd.* (2), at p. 109, as explained by my noble and learned friend Lord Russell of Killowen in *Victoria Spinning Co.* (*Rochdale*), *Ltd.* v. *Matthews* (5). Originally designed as a test for the scope or sphere of the employment, the doctrine seems sometimes to have been used for a wider purpose. It may be of use as a test in some cases, but, for my part, I think that it will be misleading in others. It is plain that many—perhaps most—of the regulations and orders applicable to a man's employment are designed simply to prevent added perils being occasioned to him and his fellow-workmen in that employment. Yet it is clear, that, if the case comes within subsect. (2), the man will be entitled to compensation notwithstanding the added risk which he has run by his disobedience. That obviously is the very object of the subsection in the case of death or serious and permanent disablement being caused by the accident. For this reason, it is clear, I think, that the "added peril" test is quite inapplicable to subsect. (2). In my opinion, it is only useful in its application to subsect. (1) if it is a matter of doubt whether or not a particular act is within a man's employment. In such a case, the circumstance that the act in question involves an added peril may help to the conclusion that the act was not intended to be within the scope of the man's employment. I do not think that Lord Sumner meant anything more than this in the oft-quoted statement from *Lancashire & Yorkshire Ry. Co.* v. *Highley* (6), at p. 372. I will add on this point that I agree in all respects with the opinion of my noble and learned friend Lord Atkin in *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (7), at pp. 78, 79.

I venture to add a comment on the proposition that, in answering the question whether subsect. (2) applies, the test is whether, if there had been no regulation forbidding what the man did, the injury would have been due to an accident arising out of and in the course of his employment. I think that this test is a useful one, provided that the regulation is only a prohibition as to an act which, but for the prohibition, would be within the scope of the man's employment. The regulation, however, may be one limiting the scope or sphere of the man's employment, or it may be a regulation with both effects, and in those cases the result of wholly disregarding it will be to alter the contract between the employer and the workman—which cannot be intended. Thus, suppose that there is a regulation stating that men engaged to clean certain machines are not to set them in motion. If a man engaged as a cleaner does an act outside his job by setting a machine in motion, he will not, speaking generally, be entitled to the benefit of subsect. (2) merely because there is a prohibition against his doing so: *Wilsons & Clyde Coal Co.* v. *M'Ferrin* (4).

My Lords, on the facts found by the arbitrator, the answers to the three questions I have formulated must be as follows. First, the accident did not arise out of the employment. The man was given a safe route, but chose to take one which was prohibited because of its dangers: *Moore (A. G.) & Co.* v. *Donnelly* (3). Secondly, the answer to the first question is solely due to the circumstance that the accident to the workman occurred while he was contravening the regulations as to his proper route from the engine-house to the station. The prohibited route was along the railway line of the respondents, and it was clearly prohibited merely because of its danger to a man who, in the course of his duty, is going from the engine house to the station, or in the reverse direction. In these circumstances, the test above referred to can properly be applied. If there were no prohibition, would the act have been one which arose out of and in the course of the man's employment? The answer must be in the affirmative. The third question must also, I think, be answered in the affirmative. I cannot think that the county court judge rejected this view, as Macnaghten, J., thought. It is true that there was no emergency, but it seems to me impossible to believe, or reasonably to conjecture, that the man was walking along the line a little after midnight on a dark night in the direction of the junction station for any other purpose than to catch the 12.25 a.m. train to East Croydon. The facts are found in the award. The man had entered upon his employment at the engine-shed. He was told to go to the station for the purpose of getting on to the 12.25 train. He was killed, shortly after leaving the shed, on the railway lines of the respondents, whilst going by the most direct (though a prohibited) route to the station. There is no suggestion that he deviated from the safe route to fulfil any purpose of his own. He was still on the respondents' premises, and was going about his allotted job. The necessary inference is that he was walking along the line "for the purposes of and in connection with his employer's trade or business." The arbitrator seems to have come to an opposite conclusion as the result of a desire to follow a statement by Atkin, L.J., in *Davies* v. *Gwauncaegurwen Colliery* (8), at p. 665. The statement was perfectly correct, if I may say so, on the facts of that case, but it was not intended to lay down any general rule as regards prohibited areas.

If the views above expressed are correct, it must follow that the decision in *Clarke* v. *Southern Ry. Co.* (1) is erroneous, and cannot be relied on.

My Lords, I have hesitated on the question whether the case ought not to be remitted to the arbitrator for findings on the questions which I have defined above, or some similar questions which your Lordships might approve, but, on the whole, I think that he has found all the facts which are necessary for deciding the matter, and that we ought not, in the circumstances, to shrink from deciding whether or not these facts entitled the appellant to succeed. On the fullest consideration, I am of opinion that the case comes within the terms of sect. 1 (2) of the Act, that the accident must be deemed to arise out of and in the course of the employment, and that the appellant is, therefore, entitled to succeed on this appeal. For these reasons, the judgment of the Court of Appeal should be reversed and the award set aside. The matter must be remitted to the arbitrator, unless the parties agree, for the purpose of fixing the amount of the compensation.

LORD ATKIN: My Lords, this is another case illustrating the difficulties which have been occasioned in the course of the working of the Workmen's Compensation Act, 1925, in giving effect to sect. 1 (2) of the Act. There can be no doubt that the subsection, when introduced as sect. 7 of the Act of 1923, was intended to be, and still remains, a provision giving important and extended relief to workmen as compared with that to which they had been held to be entitled under the then-existing legislation. The extent of the new relief given had to be determined by the courts, and must be taken to be defined by the decision of this House in 1926 in *Wilsons & Clyde Coal Co.* v. *M'Ferrin* (4). Whether that decision construed the section as favourably for the workmen as the legislature may have intended is not now a subject for judicial discussion. It is authoritative, and, as in duty bound, I accept it. The effect of the decision seems to be that, in ascertaining whether a workman is entitled to the benefit of the subsection, you still have to consider whether he was acting within the scope of his employment, but for that purpose you are to ignore the regulations or orders in contravention of which he was acting. If, apart from them, you discern his employment, you must decide in respect of that employment whether the accident arose out of and in the course of it. I personally do not find this very easy. I find it difficult to abstract from the definition of the employment all the regulations and orders made or given in respect of it, contravention of any one of which is *ex hypothesi* to be ignored. I find this all the more difficult when I find that prohibitions which before 1923 were held to be prohibitions limiting the scope of the employment, as in *Moore (A. G.) & Co.* v. *Donnelly* (3), are amongst those to be ignored: see *Wilsons & Clyde Coal Co.* v. *M'Ferrin* (4), at p. 388. I must, therefore, ignore at any rate some scope-limiting regulations. No doubt that is why by the section the accident is not said to arise in the course of employment, but is deemed so to arise. Moreover, the effect of scope-limiting regulations on the ascertainment of the scope of the employment still seems to survive in cases not falling within the section, which only applies in cases of death or serious and permanent disablement. It would appear, therefore, that in little injuries you are to give full effect to the scope-limiting regulations, while in big injuries you disregard them, or some of them, if they have been contravened, and it is deemed that they do not limit the scope of the employment. It seems to follow from this that, to ascertain the scope of the employment, you may still take into account the whole body of regulations and orders which affect the employment, but, if serious injury results from the contravention of one of them while the workman is acting for the purposes of, and in connection with, his employers' business, the scope of the employment is deemed to be extended. I also think that, notwithstanding the prohibition and its contravention, and altogether disregarding the prohibition, it may be possible to show that the injured workman was injured outside his employment. The guard is not employed as engine driver, and, if injured while driving the train, would *prima facie* not have suffered injury arising out of and in the course of his employment, even though the employers had made an express regulation that no guard was to drive an engine. I except cases of emergency, where the duty may be considered to be extended. Similarly, a packer in the warehouse would not be employed as a weaver, whether or not there was a prohibition against his acting as such. In the present case, ignoring, as I think is right, the prohibition contained in r. 15 of a circular issued by his employers, what is there to indicate that the deceased workman Noble was not injured while acting within the scope of his employment? He was a fireman. He had reached his place of work, the engine-shed. He had received orders to proceed to the station to catch a train which would take him to his working job. In obedience to the orders he was walking to the station. Everything happened in regular course of employment, except that he was proceeding by a route forbidden by the prohibition. I am not clear from the judgment of the county court judge whether he meant to decide that the man was not acting for the purposes of his employers' business. It is, to my mind, quite clear that he was, and that there was no evidence to the contrary. I wish to affirm the decision in *Stokoe* v. *Mickley Coal Co., Ltd.* (9) that in such cases the motive with which the man was acting is irrelevant. Few men disobey a prohibition except for the reason that they find it irksome, and that it is more convenient for them to disregard it. If motive in this sense negatived the condition, the section might as well never have been passed. I come to the conclusion, therefore, that the only evidence in the case establishes that the man was acting for the purposes of, and in connection with, his employers' trade or business, and that, in the circumstances, the accident must be deemed to arise out of and in the course of his employment. I have not thought it necessary to deal with the numerous cases referred to in argument. The county court judge had 20 cases cited to him. We had 60. I suppose with a due sense of proportion, the Court of Appeal had 40. I venture to think that the more recent decisions have rendered many of the earlier ones useless for the purpose of construing this section, and I agree with GODDARD, L.J., in *Seviour* v. *Somerset Collieries, Ltd.* (10) that *Thomas* v. *Ocean Coal Co., Ltd.* (2) is a landmark in this branch of the law. It appears to me to cover this case, and, together with *Wilsons & Clyde Coal Co.* v. *M'Ferrin* (4) and *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (7), which deals with the associated subject of negligence, affords authority which should be sufficient to determine most of the problems which arise in connection with this section. It is apparent that earlier decisions on the section must be read in the light of these cases. I doubt, for instance, whether I could adhere to some of the remarks I made in my own judgment in *Davies* v. *Gwauncaegurwen Colliery* (8), one of the earliest pronouncements of the courts on the section when it was first introduced in 1923. The decision in *Clarke* v. *Southern Ry. Co.* (1), which was treated rather reluctantly by the majority of the Court of Appeal as binding on them, is inconsistent with the recent cases, and must now be treated as overruled. Since this case was argued, *Seviour* v. *Somerset Collieries, Ltd.* (10) has been reported in the Court of Appeal. It was very similar to this, and the judgment of SLESSER, L.J., appears to me to be convincing. I think that the appeal should be allowed, and the case remitted to the county court judge for him to make an award for the admitted amount of compensation.

LORD WRIGHT: My Lords, I do not imagine that your Lordships would ever have been troubled with this case if it had not been for the decision of the Court of Appeal in *Clarke* v. *Southern Ry. Co.* (1). In that case, the facts were in no material respect distinguishable from the present. The man was actually injured by slipping as he jumped on a moving engine, but, on the facts, the county court judge held that the attempt to board the engine did not affect the claim. However, he was injured when contravening the very order to proceed by a particular route which the deceased man was contravening in the present case. The county court judge in *Clarke* v. *Southern Ry. Co.* (1), showing a just appreciation of the law as laid down in *Wilsons & Clyde Coal Co.* v. *M'Ferrin* (4), held, on the facts which he found, that the man, though contravening an order, was doing the work for which he was employed, and was acting for the purposes of, and in connection with, his employers' trade or business. On these findings, the case fell within sect. 1 (1), (2), of the Act. The accident arose out of and in the course of the employment, save in the one respect that the man was contravening an order of his employers, but, under sect. 7 of the Act of 1923, now sect. 1 (2) of the Act of 1925, as the accident resulted in serious disablement, it was deemed so to arise, subject to the condition which was found to have been fulfilled. On the judge's findings, the case fell precisely within the ruling of *M'Ferrin's* case (4), and the judge properly so held. His decision was, however, overruled by the Court of Appeal, not on the facts, which it was not competent to the court to question, but, so far as I can understand, on grounds completely inconsistent with what this House decided in *M'Ferrin's* case (4). I feel no doubt that the decision of the Court of Appeal was wrong. I can understand the difficulty in which both the county court judge and the Court of Appeal were placed in the present case. What a court should do, when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House, is a problem of some difficulty in the doctrine of precedent. I incline to think that it should apply the law laid down by this House, and refuse to follow the erroneous decision. However, I cannot blame the Court of Appeal for leaving it to this House to point out that the decision in *Clarke* v. *Southern Ry. Co.* (1) was at the time inconsistent with *M'Ferrin's* case (4), and is also inconsistent with what this House said later in *Thomas* v. *Ocean Coal Co., Ltd.* (2) and *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (7). It is enough here to say that *Clarke's* case (1) was wrongly decided. Indeed, the contrary is unarguable. Judgment in the present case, therefore, should be entered for the appellant.

There are two points on which I have felt any question. One was the absence in the county court judge's statement of the facts of any express finding that Noble was acting for the purposes of, and in connection with, the employers' trade or business. On the facts, however, it is clear that he was doing so. In proceeding to East Croydon station, he was doing what his employment required him to do. His motive, in the narrower sense of the immediate urge in choosing to go by the prohibited route, is immaterial, whether it was to save time or to save himself trouble. The test is objective, and depends on the fact that his proceeding to the station was within the sphere of his employment. The case is thus precisely within the language of VISCOUNT DUNEDIN in *M'Ferrin's* case (4), at p. 388:

> The only reason for saying that the accident did not arise out of the employment was . . . that the prohibition . . . made it clear that what the workman was doing was not within the scope of his employment, but that is precisely the case for the application of sect. 7 [now sect. 1 (2) of the Act of 1925]. The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition.

As it is impossible, in my opinion, on the facts of this case, to arrive at any conclusion other than that the man was proceeding for the purposes of, and in connection with, his employers' trade or business, I do not think that any importance can be attached to the absence of a finding on the part of the county court judge. Then there is the question whether the case should not be remitted to the county court judge to reconsider his decision in the light of the ruling of this House. I think it is not obligatory to do so. The facts are free from dispute, and I am of opinion that the precedent established in similar circumstances in *Thomas* v. *Ocean Coal Co., Ltd.* (2) should be followed. This House there took upon itself the responsibility of deciding whether the case fell within the statute, and the same course should be followed in this appeal. I apprehend that the amount of compensation is not likely to be in dispute. If it is, the county court judge must decide what it is.

This case seems to me to be so clearly within the principles established by this House in *M'Ferrin's* case (4) and again in *Thomas* v. *Ocean Coal Co., Ltd.* (2) that I find it hard to realise how some days were spent in argument, and, as my noble and learned friend Lord Atkin has pointed out, no less than 60 authorities were cited. I cannot remember how many authorities were cited in *Thomas* v. *Ocean Coal Co., Ltd.* (2), but I feel no doubt that a great number were cited in argument. In the end, however, and perhaps earlier, it was clear that *M'Ferrin's* case (4) concluded the matter, and here it is doubly clear that the matter is concluded by these decisions of the House. Along with the other Lords who took part in the debate, I have said all that I can usefully say on the question in *Thomas* v. *Ocean Coal Co., Ltd.* (2), and, on the more general kindred question of the construction of the Act, in *Harris's* case (7). If I attempt to repeat myself, I shall only again add to the number of phrases or paraphrases which have accumulated round the Act, and have furnished material for the ingenuity of advocates and the embarrassment of county court judges. I have often reflected with sadness that the Act was intended to be administered with as little technicality as possible, yet thousands of reported cases have accumulated round it, and fresh ones are likely to go on accumulating so long as the Act remains in its present form. Most of these cases, in truth, depend on questions of fact, yet in *Lancashire & Yorkshire Ry. Co.* v. *Highley* (6) Lord Finlay, L.C., wisely observed, at p. 359:

> . . . a finding of fact in one case cannot be a safe guide as to a finding of fact in another case.

The fundamental and initial question in every claim under the Act must be whether the accident arose out of and in the course of the employment. That is a question of fact, which can only be decided by the county court judge by applying his common sense and his knowledge of industrial conditions to the evidence before him, though with due regard to any principles laid down by the courts. When he has come to a conclusion on that point, he will, as a matter of construction of the Act, observe that the man's negligence is immaterial—a principle, I hope, cleared up for good and all by the decision in *Harris's* case (7) —and that, if the accident results in death or serious and permanent disablement, the claim is not barred because the accident is attributable to serious or wilful misconduct, and he will in proper cases observe further that it is not barred if the case falls within sect. 1 (2) of the Act.

I think it is true to say that, as time has gone on, the courts have taken a fairer and more common-sense view of the circumstances which justify an affirmative finding on this point. I question if *Highley's* case (6) or *Stephen* v. *Cooper* (11) would now be decided, on the facts, against the claimant. In the former case, the man was negligent in not seeing, before he ran between the wagons, that an engine was not coupled to the train, and, in the latter, he was negligent in not stopping the knives of the mower when he walked along the pole to do what was necessary for the conduct of the work—namely, refix the chain on the hook. In the latter case, his manner of doing the job was grossly, even recklessly, negligent, but was it more ? In the last resort, these cases seem to turn almost entirely on issues of fact. It is in general futile to argue by analogy from one case to another, though certain generalisations laid down in the authorities may need to be applied or considered in particular cases, and the decision must be based on the actual words of the Act, and on any decisions construing them. Thus, for instance, in any similar case, the arbitrator would have to apply the principles laid down in *Wilsons & Clyde Coal Co.* v. *M'Ferrin* (4) or in *Harris's* case (7). Neither *Highley's* case (6) nor *Stephen* v. *Cooper* (11) is relevant in this case, because neither case involved disobedience to orders or directions, or acts done without instructions. If that had been so, the rules to be applied are to be found in the decisions of this House, which I think is not so ready as it was in the past to forget that it is simply construing a statute, or to import limitations and refinements for which the words of the statute afford no justification. I feel no doubt that the action of the legislature in denying to the courts the power (in the case of death, etc.) to exclude a claim on the ground that the man was infringing a prohibition, and the action of this House in making it clear that the workman's negligence, by adding a risk, did not bar his claim so long as the accident arose out of and in the course of his employment, have done much to change the general attitude of the courts in considering these cases. The amendment embodied in sect. 7 of the Act of 1923 has had a wider influence than what it immediately enacted. Thus, the view of the law stated by LORD SUMNER in *Highley's* case (6) was, indeed, adopted by this House in *Moore (A. G.) & Co.* v. *Donnelly* (3), but, when that case is seen to be overruled because of the amendment of the law by sect. 7 of the Act of 1923, now sect. 1 (2) of the present Act, as explained in *M'Ferrin's* case (4), the somewhat narrow view stated by LORD SUMNER can no longer be regarded as law. I concur in the motion proposed.

LORD PORTER: My Lords, I am asked by my noble and learned friend LORD ROMER to say that he concurs in the opinions which your Lordships have expressed.

My Lords, on Aug. 25, 1938, the appellant's husband Thomas Noble was knocked down and killed by an electric train on the respondents' railway. Thomas Noble was employed by the respondents as a "passed fireman." That is to say, he was qualified to act as a driver of a steam locomotive, but was still graded as a fireman. He had been attached to the locomotive depot at Norwood Junction since Mar., 1936. At the time of his death, he was employed on "piloting duties." That is to say, when a driver was not acquainted with the railroad, Thomas Noble was sent to accompany him and show him the way. On the night of Aug. 24-Aug. 25, 1938, Thomas Noble had reported for duty at the engine-shed of the depot at Norwood Junction about midnight. He was then instructed by the foreman to go to East Croydon and carry out piloting duties there. In order to get to East Croydon, it was necessary for him to walk from the locomotive depot to the station at Norwood Junction, and from there to proceed as a passenger by train to East Croydon. After receiving his instructions, he was entitled to occupy 10 minutes in reading notices and 13 minutes in walking from the depot to the station. His train started from Norwood Junction at 12.25 a.m.

It was the practice of the company to issue a blue book to each member of their staff, and one such book was issued to Thomas Noble on Dec. 6, 1932. Rule 15 in that book was in the following terms:

> Employees are expressly prohibited from walking upon the line or crossing the rails (except at a public level crossing) unless they are required to do so in the execution of their duty or are proceeding to or from their work by a route permitted by the company. Any employee walking upon the line or crossing the rails, except as aforesaid will be acting outside his employment.

The locomotive depot at Norwood Junction was opened on July 6, 1935, and on July 5 a notice to all concerned was issued in these terms:

> A new locomotive depot will be brought into use on Saturday night, July 6, 1935. Enginemen and others must note that the route to be taken is from the up side of the station, *via*:— Company's footpath, Causeway, Portland Road, South Norwood High Street, Goat House Bridge, Penge Road. West Croydon locomotive depot will be closed from that date.

Apparently, in spite of the instructions issued to their staff not to walk along the metals, numerous accidents had occurred as a result of the breach of r. 15, and a fresh circular was issued, again calling attention to its terms.

So far as Thomas Noble was concerned, the facts appear to be that he did not follow the route indicated in the notice issued on July 5, 1935, but, instead of crossing the line over the footbridge and proceeding along the footpath leading to Penge Road, he continued along the company's line, and was struck by an electric train travelling in the same direction as that in which he was walking, carried for some 70 yds., and killed. The accident took place at 12.14½ a.m. It was found by the county court judge that he had reasonable time to reach the station if he had proceeded by the indicated route. It appears that he left the engine shed at 12.14 a.m., and no evidence was given as to his reasons for proceeding by the railway line instead of by the prescribed route. In these circumstances, the county court judge held that the appellant was not entitled to recover compensation, and this decision was affirmed by the Court of Appeal, from whose judgment the present appeal is brought. A

The determination of the question at issue appears to depend largely upon the true meaning of the Workmen's Compensation Act, 1925, s. 1 (1), (2). Subsect. (1) is too well-known to require repetition. Subsect. (2) provides as follows:

> For the purposes of this Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business. B C

From that subsection, it is apparent that, in order to entitle an applicant to recover, though the injury upon which reliance is placed must arise out of and in the course of the man's employment, yet, in deciding whether it so arises, the fact that the workman was acting in contravention of any statutory or other regulation, or of any orders of his D employer, or without instructions from his employer, is to be neglected. That is to say, if the act would be within the scope of the man's employment but for the regulation or order, or lack of instructions, it is none the less within his employment despite those regulations, orders, or want of orders. The object of this provision appears to have been E to deal with the difficulties created by the decision in *Moore (A. G.) & Co.* v. *Donnelly* (3), in which it was held that the prohibition of an act otherwise within the scope of a workman's employment might be sufficient to take it outside this scope, and to prevent the workman or his dependants from losing the right to compensation merely because F of the breach of such statutory or other regulation. This advantage, however, was only to be obtained subject to the proviso that the forbidden act must have been done for the purpose of, and in connection with, the employer's trade or business.

In the present case, the county court judge found that the act of G walking along the railway line was not within the sphere of the workman's employment, but, though his language is a little obscure, he appears to have thought that, in spite of the terms of sect. 1 (2) of the Act, the prohibition contained in r. 15 could so limit the scope of the workman's employment as to make an act in contravention of it outside H his employment. He said:

> The prohibition, in my view, placed the act of walking on the permanent way outside the scope or sphere of his employment. If the familiar test laid down by LORD SUMNER in *Lancashire & Yorkshire Ry. Co.* v. *Highley* (6), at p. 372, were put in relation to the present arbitration, it could not possibly be said that it was part of Noble's employment to hazard, to suffer or to do what caused his injury.

He also seems to have thought that the act of walking along the metals could not in any case have been done for the purposes of, and in connection with, the employers' business; and was, therefore, not within the proviso to sect. 1 (2). His words are as follows:

> His [the workman's] action [in *Thomas* v. *Ocean Coal Co., Ltd.* (2)], though A hazardous, was held by LORD BUCKMASTER, at p. 110 to be "... due to the man's desire to expedite the process he was engaged to control." That can hardly be said in the present case. . . . Where defined areas are forbidden to a workman, the main current of authority is against applying subsect. (2). In *Davies* v. *Gwauncaegurwen Colliery* (8), ATKIN, L.J., at p. 665, laid down that in such an area a workman can have no business, and, therefore, he can only be there for his own purposes. . . . Finally, in *Knowles* v. *Southern Ry. Co.* (12), LORD RUSSELL held B in most sweeping terms, at p. 472, that the subsection only applies "to acts merely incidental to the employment," and that, where acts are expressly forbidden, they can "by no stretch of imagination . . . 'be said to be [acts] done by the workman for the purposes of and in connection with [the] employer's trade or business.'"

The respondents' representatives, recognising, I think, that the words of LORD SUMNER were used before the passing of the provisions of the C Workmen's Compensation Act, 1923, which were afterwards re-enacted in sect. 1 (2) of the Act of 1925, and that they could not be applied without the limitation necessitated by that Act, did not attempt to support the county court judge's conclusion that the prohibition prevented the act leading to the injury from being within the scope of the D man's employment. They said, however, that to pass along the permanent way, whether forbidden or not, was no part of his duty. In the first place, they contended that the route by which he was to go from shed to station was prescribed in the notice of July 5, 1935, and for the man to go by any other route was for him to leave his work and E undertake a task outside its scope. If this view be true, he would not be within the sphere of his employment if, instead of passing along the footpath to the west of the railway line, he had crossed by Portland Road Bridge and then walked along Clifford Road to his destination, though to do so would only be to use a route along a metal road instead F of a route along a footpath. I cannot think that such a conclusion is justified, or that every variation of the route prescribed, however safe, must be regarded as outside the work which he was employed to do. In my view, the so-called prescribed route is not a limit outside which the man has ceased to be acting within his employment. He G may, indeed, be acting in contravention of his master's orders, but, except in this respect, he is not going outside the sphere of his duties, and, if he were only acting contrary to orders, he would still be deemed to be within the sphere of his duties under the provisions of sect. 1 (2) of the Act of 1925.

H Then it was said, however, that, even if he might make his way along one of the other roads without leaving his employment, he was no more entitled to walk along the railway line than to engage in platelaying or other work on the permanent way. The risks which he undertook by so acting were, it was contended, not those of a "passed fireman," but those of the repairing staff. For this contention, reliance was placed chiefly on the words of Lord Sumner in *Lancashire & Yorkshire Ry. Co.* v. *Highley* (6), at p. 372:

> There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury?

A Reliance was also placed upon the decision in *Clarke* v. *Southern Ry. Co.* (1), but a series of cases, beginning with *Barnes* v. *Nunnery Colliery Co., Ltd.* (13) and ending with *Stephen* v. *Cooper* (11), was also called in aid.

B In applying these decisions, however, care must be taken to differentiate between those in which it was held that a contravention of orders had taken an act which would otherwise be within a man's employment outside its scope and those in which the act which caused the injury was not within the man's work for reasons other than that it was prohibited. C Since the Workmen's Compensation Act, 1923, afterwards re-enacted in sect. 1 (2) of the Act of 1925, a mere contravention of orders is not sufficient. Some, indeed, of the cases quoted undoubtedly do deal with the question of the limitation of the man's employment quite apart from any contravention of orders. Even in the latter cases, however, D though any determination of principle is helpful, findings of fact—even in circumstances somewhat similar to the case under consideration—are of no real assistance. Each case must depend upon a careful consideration of its own facts. As Lord Dunedin said in *Plumb* v. *Cobden Flour Mills Co., Ltd.* (14), at pp. 65, 66:

> E It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a judge F in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself.

The distinction now to be made between cases in which sect. 1 (2) is applicable and those in which it is not is perhaps best illustrated G by the decision in *Wilsons & Clyde Coal Co.* v. *M'Ferrin, Kerr* v. *Dunlop (James) & Co.* (4), in which your Lordships' House considered the cases of two separate workmen, one of whom returned to a shothole in the mistaken belief that a shot which he had fired had exploded, and was injured. In so returning, he was acting contrary to a statutory regu- H lation, but was nevertheless held entitled to recover. The other, who was a miner, coupled an electric cable to a detonator for the purpose of firing a shot. This act was also contrary to a statutory regulation, but, in any case, was no part of the duty of a miner. The first man recovered because the only ground for refusing compensation was that his act was prohibited. The second failed to recover, because, quite apart from the prohibition, he had arrogated to himself the duties of a fireman, which duties were not his, in any case, to perform. Indeed, in the course of the argument before us, both sides accepted the position laid down by VISCOUNT DUNEDIN in *Wilsons & Clyde Coal Co.* v. *M'Ferrin* (4)— namely, that one ought to disregard the fact that the workman, at the A time when he met with his accident, was acting in contravention of a regulation, and to determine, without reference to that fact, whether the accident arose out of and in the course of his employment. No doubt this question may often be a matter of some nicety, and a question of degree. I can imagine an employee ordered to proceed to France B at the present day arguing that he was entitled to travel by steamer, or train-ferry, or even by air, but I should not think it permissible for him to cross by row-boat, or to proceed by canoe. Whether, if he had ample time, it would be permissible for him to proceed by sailing boat might be a matter of more doubt.

C Since the decision in *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (7), it is plain that mere danger, or even recklessness, is not enough to take an act, otherwise within the scope of a man's employment, outside it. It is true that LORD BUCKMASTER says in *Thomas* v. *Ocean Coal Co., Ltd.* (2), at p. 109:

D

> Conduct can, of course, be so reckless and so unnecessary as to take it outside the meaning of the statute . . .

These words, however, must be read in the light of his previous observations, at p. 109:

> E In one sense, every method of performing an operation in the course of a man's employment that is not the safest is an added peril, but the Act contains no provisions that exclude from its benefits an accident that has arisen through a method of work which was not the safest in the circumstances.

They must also be read in the light of the observations of LORD ATKINSON in *Barnes* v. *Nunnery Colliery Co., Ltd.* (13), at p. 49:

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> In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well be held in most cases rightly to be a risk incidental to his employment. Not G so in the other case.

The words of LORD BUCKMASTER mean, I think, no more than that the man must be really engaged in attempting to perform his duty, and not, as in *Stephen* v. *Cooper* (11), engaging in a frolic of his own under the pretence of doing his master's work.

H Disregarding r. 15, then, was the workman in the present case engaged on his proper work at the time of his death, and did the accident arise out of his employment? He appears to me to have been so engaged. He had signed on at the depot. He had read the notices, and he was passing from one part to another of his employers' premises in the course of reaching a station, from which, again, he was to proceed for the purpose of his work. It was not a case such as *St. Helens Colliery Co., Ltd.* v. *Hewitson* (15), where the workman was proceeding towards his employers' premises, and was 6 miles from them when the accident occurred. In that case, as Lord Wrenbury pointed out, the employers' had no right to give an order at the place where the man was injured. In the present case, the man's work was not confined to the footplate, and he had A already reached the ambit of those premises on which his employers' orders would have to be obeyed. He was not arrogating to himself some new duty. He was engaged on the duties of his employment, however negligently or recklessly he may have been performing them.

It is said, however, that this is not enough. The workman must not B only fulfil the substance of sect. 1 (2). He must also be shown to have come within the proviso to it. That is to say, he must obtain a decision from the county court judge that, in disobeying the prohibition imposed upon him, he was acting for the purposes of, and in connection with, his employer's business. No doubt it is true that his fulfilment of the proviso C must be proved, and, if the county court judge had found as a matter of fact that, at the time of the accident, he was not fulfilling his master's purposes, and if the evidence supported that finding, the appellant must fail. In the present case, however, the county court judge has not, in my view, based himself upon a finding of fact. He has misdirected D himself on a question of law. Perhaps this view is best exhibited in the words which he quotes from Lord Russell of Killowen in *Knowles* v. *Southern Ry. Co.* (12), which have been set out above—words which were applicable to the facts of the case then under consideration, but have no application to the present case. The mistake which I think he E makes is in believing that a prohibited act cannot be said to be done for the purposes of, and in connection with, the employers' business. Such a result would make the section meaningless, since, if it were correct, the workman might, indeed, be deemed to be within the sphere of his employment, but could never be acting for the purposes of, or in connection F with, his employers' business in doing a prohibited act. In the present case, all the facts proved show that the man was proceeding to Norwood Junction station for the purposes of his work, and that he was just as much acting in connection with it as a workman proceeding from one portion of his employer's warehouse to another in order to execute G some work at the spot to which he was making his way. Having regard to the facts proved, I do not think that it was open to the county court judge to come to any conclusion other than that the deceased man was passing along the permanent way for his employers' purposes, and in connection with their business. H

However, just as it was said that, in order to succeed, the appellant must obtain a determination in her favour that the proviso had been fulfilled, so, it was contended, she required a finding by the county court judge that, at the time of the accident, Thomas Noble was acting in the course of his employment, and that the accident arose out of it—

a finding which she had not obtained. Here again, I think, the county court judge has misdirected himself in thinking that the prohibition placed the route taken by the deceased man outside the scope of his employment. To take such a view is, I think, to disregard sect. 1 (2) of the Act of 1925, and leaves your Lordships free to determine whether the act was within the man's employment. A similar conclusion was reached in *Thomas* v. *Ocean Coal Co., Ltd.* (2) and *Dennis* v. *White (A. J.) & Co.* (16), in both of which cases your Lordships' House felt itself free to draw its own conclusions from the facts found by the county court judge, and reversed his finding that the workman was not entitled to recover. The observations of LORD BUCKMASTER in *Thomas's* case (2), at p. 108, and those of LORD PARKER OF WADDINGTON in *Dennis's* case (16), at p. 493, state, I think, the principles on which your Lordships should act. I would allow the appeal and reverse the decisions of the county court judge and the Court of Appeal. I am glad to feel that the majority of the Court of Appeal would have reached a similar conclusion if they had not felt themselves bound by *Clarke* v. *Southern Ry. Co.* (1), which, I think, must now be regarded as overruled.

Appeal allowed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant); *H. L. Smedley*, Solicitor, Southern Railway (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

KNIGHTSBRIDGE ESTATES TRUST, LTD. *v.* BYRNE AND OTHERS.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **April 2, 3, 4, 22, 1940.**]

Mortgage—Mortgage by company—Principal repayable by instalments over period of 40 *years—Postponement of redemption—Reasonableness of postponement—Clog on equity—Rule against perpetuities—Whether mortgage a debenture—Companies Act,* 1929 (*c.* 23), *ss.* 74, 380.

An estate company borrowed a sum of £310,000 from an insurance company, and as security mortgaged to the lenders property consisting of 75 houses, 8 shops and a block of flats. It was a term of the mortgage that the principal should be repaid by 80 half-yearly instalments spread over a period of 40 years. The mortgagee's remedies became immediately exercisable if the mortgagors should sell the equity of redemption without the consent of the mortgagees. There was no power under which the mortgagors could sell any one of the properties mortgaged free from the mortgage. The mortgagors were restrained from granting leases for more than 3 years without the consent of the mortgagees. The term for repayment was suggested by the mortgagors. The mortgagors claimed that they were entitled to redeem the mortgaged property after the expiration of 6 months' notice upon their paying to the lenders the principal, together with interest and costs. It was contended that a provision that the mortgage should not be redeemed until the expiration of a period of 40 years was void as being a clog on the equity of redemption, and that the mortgage deed infringed the rule against perpetuities. For the respondents, it was contended that any doubt as to the validity of the provisions postponing the right of redemption was removed by the fact that the mortgage was a debenture within the meaning of the Companies Act, 1929, s. 74, having regard to the definition in sect. 380 thereof :—

Held : (i) the mortgage was a " debenture " within the meaning of the Companies Act, 1929, s. 74, as defined by sect. 380 thereof, and accordingly the provisions which postponed the right of redemption were valid in any event.

(ii) the rule against perpetuities does not apply to mortgages.

(iii) read in the light of the provisions of sect. 74 of the Act of 1929, the terms of the mortgage were neither so stringent nor so oppressive as to justify the interference of the court.

Order of Court of Appeal ([1938] 4 All E.R. 618) *affirmed on other grounds.*

[**EDITORIAL NOTE.** The decision of the Court of Appeal in this case that the right of redemption could be so long postponed was generally thought to be contrary to the view expressed by the majority of textbook writers. The consideration of the matter by the House of Lords was, therefore, a matter of no little importance, and there will be some regret that the House have not found it necessary to consider this aspect of the case. In the court of first instance, Luxmoore, J., held that the deed here in question was not a debenture. This question the Court of Appeal did not find it necessary to decide, but the House of Lords have taken it first, since, if it was a debenture, clearly the other points do not arise. On this point, the House has decided that this deed, though in form a mortgage, is a debenture within the meaning of the Companies Act, 1929. For the purposes of sect. 74 of that Act, which removes the equitable rule against securities being irredeemable or redeemable only on a remote contingency, the term debenture has the meaning given to it by sect. 380 of the Act, but their Lordships find it difficult to give any precise definition of the term " debenture."

As to Meaning of Debenture, see HALSBURY, Hailsham Edn., Vol. 5, pp. 474, 475, para. 769; and for Cases, see DIGEST, Vol. 10, pp. 743, 744, Nos. 4637, 4638.]

Cases referred to :

(1) *Levy* v. *Abercorris Slate & Slab Co.* (1887), 37 Ch.D. 260 ; 7 Digest 31, *156* ; 57 L.J.Ch. 202 ; 58 L.T. 218.

(2) *British India Steam Navigation Co.* v. *Inland Revenue Comrs.* (1881), 7 Q.B.D. 165 ; 6 Digest 500, *3172* ; 50 L.J.Q.B. 517 ; 44 L.T. 378.

(3) *Lemon* v. *Austin Friars Investment Trust, Ltd.*, [1926] Ch. 1 ; Digest Supp. ; 95 L.J.Ch. 97 ; 133 L.T. 790.

(4) *Samuel* v. *Jarrah Timber & Wood Paving Corpn., Ltd.*, [1904] A.C. 323 ; 10 Digest 782, *4892* ; 73 L.J.Ch. 526 ; 90 L.T. 731 ; *affg.*, [1903] 2 Ch. 1.

(5) *Re Southern Brazilian Rio Grande do Sul Ry. Co., Ltd.*, [1905] 2 Ch. 78 ; 10 Digest 733, *4582* ; 74 L.J.Ch. 392 ; 92 L.T. 598.

(6) *Floyer* v. *Lavington* (1714), 1 P. Wms. 268 ; 35 Digest 355, *984*.

(7) *Kreglinger* v. *New Patagonia Meat & Cold Storage Co., Ltd.*, [1914] A.C. 25 ; 35 Digest 241, *20* ; 83 L.J.Ch. 79 ; 109 L.T. 802.

(8) *Lindsay* v. *Cundy* (1876), 1 Q.B.D. 348 ; 42 Digest 679, *910* ; 45 L.J.Q.B. 381 ; 34 L.T. 314 ; *on appeal* (1878), 3 App. Cas. 459.

(9) *Ely (Dean)* v. *Bliss* (1852), 2 De G. M. & G. 459 ; 42 Digest 679, *908* ; 20 L.T.O.S. 35.

Appeal from an order of the Court of Appeal (Sir Wilfrid Greene, M.R., Scott, L.J., and Farwell, J.), dated Dec. 1, 1938, and reported [1938] 4 All E.R. 618, reversing an order of Luxmoore, J., dated Apr. 13, 1938, and reported [1938] 2 All E.R. 444. The facts and the arguments are fully set out in the opinion of Viscount Maugham.

H. B. Vaisey, K.C., and *J. H. Stamp* for the appellants.

J. M. Gover, K.C., and *Wilfrid M. Hunt* for the respondents.

Viscount Maugham: My Lords, this appeal raises the question whether the appellants, who are mortgagors, are entitled to redeem on the usual notice a mortgage, dated Nov. 6, 1931, made between the appellants of the one part and the respondents (who are trustees of the Royal Liver Friendly Society) of the other part, notwithstanding a provision in the mortgage for repayment of the loan of £310,000 by 80 half-yearly instalments. It was not in dispute before your Lordships that, on the true construction of the mortgage, the appellants were not entitled to pay off the loan otherwise than by the instalments, and at the times, provided in the mortgage, so that the appellants would not be entitled to the free enjoyment of their property for 40 years except by a voluntary concession from the respondents.

Three questions of law emerged on the argument before your Lordships which may be stated as follows: (i) whether the provisions in the mortgage which purported to postpone for so long a period the right of redemption were not void in equity, as preventing redemption for an unreasonable length of time, having regard to certain circumstances which, it was alleged, made the provisions as to such postponement oppressive on the appellants, and unnecessary for the protection of the respondents, (ii) whether any of the provisions of the mortgage were invalidated by the rule against perpetuities, and (iii) whether the mortgage was a debenture within the meaning of the Companies Act, 1929, s. 74, having regard to the definition contained in sect. 380 of that Act. The first two questions raised the points on which the appellants relied. The third was a contention on the part of the respondents, who claimed that sect. 74 of the Act in effect removed any doubt as to the validity of the provisions postponing the right of redemption.

The action was heard by Luxmoore, J., who held by his judgment, dated Apr. 13, 1938, that the provision in the mortgage deferring redemption for a period of 40 years, taken in conjunction with clauses in the deed which he regarded as unusual and oppressive, was unreasonable, and constituted an unlawful clog upon the right of the appellants to redeem the mortgage, and that the appellants were entitled to redeem the mortgage on the usual notice. The judge further held, in favour of the respondents, that the rule against perpetuities has no application to mortgages, and, in favour of the appellants, that a common mortgage of freeholds is not a "debenture" within the meaning of the Companies Act, 1929, s. 74. The respondents' appeal to the Court of Appeal (Sir Wilfrid Greene, M.R., Scott, L.J., and Farwell, J.) was allowed. Judgment was delivered on behalf of the court by Sir Wilfrid Greene, M.R. It was thereby held that, while the court would not enforce any provision in a mortgage which was unconscionable, or which operated to prevent the mortgagor from exercising his right of redemption after the specified date for redemption, or which rendered the right of redemption illusory, the court is not further concerned with the question whether the terms of the mortgage are reasonable, and a provision that the date for redemption shall be postponed for a given period, however long, is not on that ground alone unenforceable. It was also held that in the present case, where the mortgage represented a commercial agreement between two important corporations experienced in such matters, the provision for repayment by instalments and the other terms above mentioned were open to no objection which justified the interference of the court. The court also held that the rule against perpetuities has no application to mortgages, but expressed no opinion as to whether the mortgage is a debenture for the purpose of the Companies Act, 1929, s. 74.

In the course of the able arguments for the appellants, it became manifest that logically the first matter to be determined was the third question above stated—namely, the question whether the Companies Act, 1929, s. 74, applied. That section is in the following terms:

> A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the commencement of this Act, shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

Sect. 380 of the Act, so far as relevant, provides:

> (1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say) . . . "Debenture" includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not . . .

If, then, the mortgage was a debenture within sect. 74, it was difficult to see how the appellants could succeed on the main point. Your Lordships, therefore, after fully hearing counsel for the appellants, thought it right to call on counsel for the respondents on the question arising under sect. 74, and eventually did not think it necessary to call on the respondents for an argument on either of the other two points which I have stated. In these circumstances, it would not be right for me to express any opinion on the first question, and I wish to reserve full liberty to consider that question if it should arise in a case where sect. 74 did not apply. On the other hand, I must make some observations on the second question, as to the application of the rule against perpetuities, a matter as regards which none of your Lordships felt any doubt that the decisions of Luxmoore, J., and the Court of Appeal were right.

My Lords, the judgment of Luxmoore, J., contains an elaborate statement of the history of sect. 74, and of the reasons which led him to the conclusion that the section did not apply to the mortgage in the present case. Unfortunately, his attention does not seem to have been called to the Companies Act, 1928, which was not a consolidating but an amending Act, and he accordingly thought that the extended definition of the word "debenture" was first found in the Companies Act, 1929, which, as he justly observed, was a consolidating statute. In fact, the extension of the definition is to be found in Sched. II of the Act of 1928, A where the added words are to be found as an amendment of the Companies Act, 1908, s. 285: see sect. 99 of the Act of 1928. The consolidating Act of 1929 reproduced as part of the consolidation the amended definition of the word "debenture," and there is, therefore, no room for any such presumption excluding an amendment of the existing law by a B consolidating statute as the judge relied on.

The position, therefore, is as follows. The substance of sect. 74 of the Act of 1929 was first found in the Companies Act, 1907, s. 14, where it was prefaced by the words "for removing doubts it is hereby declared that. . . ." There was no definition of the word "debenture," and C there is strong ground for thinking that, whatever be the ambit of the word, it did not in that section include an ordinary mortgage of land. The consolidating Act of 1908 reproduced the provision of the Companies Act, 1907, s. 14, omitting the introductory words. It was in the exact terms of the present sect. 74 of the 1929 Act. The definition clause D (sect. 285) stated that "'debenture' includes debenture stock," which perhaps made it even clearer that "debenture" did not include a mortgage of land in ordinary form. The amending Act of 1928, however, contained the provision that at the end of the definition of "debenture" in sect. 285 of the 1908 Act:

> E there shall be added the words "bonds and any other securities of a company whether constituting a charge on the assets of the company or not."

It is perhaps worth pointing out that the words "unless the context otherwise requires" which we find in the consolidating Act of 1929 are not to be found in the amending Act of 1928. I attribute little weight to F this fact, for, in my opinion, some such words are to be implied in all statutes where the expressions which are interpreted by a definition clause are used in a number of sections with meanings sometimes of a wide, and sometimes of an obviously limited, character. On the other hand, I think due weight ought to be attributed to the words "otherwise G *requires*" in the Companies Act, 1929, and it is incumbent on those who contend that the definition does not apply to sect. 74 to show with reasonable clearness that the context does in fact require a more limited interpretation of the word "debenture" than sect. 380 has assigned to it.

If we begin by asking what the word "debenture" means, apart from H any definition, the reply must be that it has no precise meaning. CHITTY, J., observed in *Levy* v. *Abercorris Slate & Slab Co.* (1), at p. 264, that the word:

> . . . means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a "debenture."

An interesting extract from SKEAT'S ETYMOLOGICAL DICTIONARY, 1882, will be found in a footnote to the case, at p. 264. Lindley, J., had previously stated simply in *British India Steam Navigation Co.* v. *Inland Revenue Comrs.* (2), at p. 172:

> Now what the correct meaning of "debenture" is I do not know.

In *Lemon* v. *Austin Friars Investment Trust, Ltd.* (3), the same ignorance was professed in the Court of Appeal. Warrington, L.J., in particular, after observing at p. 17 that it had been said "by a wiser man than myself" that it was impossible to give an exhaustive definition of the word "debenture," went on to remark that he did not propose to incur the reproach of venturing where wise men fear to tread. The textbooks are agreed at least in this—that no accurate definition of the word can be found. I think it sufficient to cite Buckley, Law and Practice under the Companies Acts, 11th Edn., p. 174, on the point. It is clear, therefore, that it was desirable to insert a definition of the word in any consolidation of the Companies Acts.

We must next ask ourselves whether there was any reason for limiting sect. 74 of the Act of 1929 to debentures of a series issued to a number of subscribers in one of the forms now in common use, or in some such way. The reason for the section is explained in the note to the section in Buckley, Law and Practice under The Companies Acts, 11th Edn., pp. 154, 155. Enormous sums had been borrowed by companies formed under the general Companies Acts on debentures and debenture stock the principal of which was (in terms) either not repayable at all or only in certain specified events. Doubts had been expressed whether these restrictions on the right of redemption were valid (*Samuel* v. *Jarrah Timber & Wood Paving Corpn., Ltd.* (4), at p. 15, and *Re Southern Brazilian Rio Grande do Sul Ry. Co., Ltd.* (5)), and it seemed desirable to remove these doubts by the Companies Act, 1907. The equitable rule was based on the hypothesis that, in a contract for a loan, the borrower is not usually contracting on equal terms with the lender. I find the reason quaintly stated in *Floyer* v. *Lavington* (6) by Sir Joseph Jekyll as counsel in a case heard by Cowper, L.C. He explained the ground for holding that a mortgage cannot be rendered irredeemable thus, at p. 269:

> . . . as the borrower is commonly necessitous, this would put it in the power of the scrivener to make advantage of such necessities, and would let in oppression, and foreclose the power and jurisdiction of this court.

In saying that this was the real foundation of the interference of the court of equity with the legal right of the mortgagee, I am not forgetting the technical account of the matter given by Viscount Haldane, L.C., and Lord Parker in *Kreglinger* v. *New Patagonia Meat & Cold Storage Co., Ltd.* (7). Viscount Haldane, L.C., himself truly observed, at p. 36, that the lending of money, on mortgage or otherwise, was looked on with suspicion, and the court was on the alert to discover want of conscience in the terms imposed by lenders.

My Lords, loans made to limited companies on the security of their assets are in general very different from loans made to individuals. Companies may be wound up, in which event their debts have, if possible, to be paid, but they do not die. To the knowledge of both the company and the lender the loan is intended in most cases to be in the nature of a
A permanent investment. The former can only in the rarest of circumstances be at the mercy of the latter. There is no likelihood of oppression being exerted against the company. Considerations such as these make it manifest that clauses in debentures issued by companies making them irredeemable, or redeemable only after long periods of time, or on con-
B tingencies ought to be given validity. It may be conceded that the ground for excluding the rule in equity is stronger in the case of a series of debentures issued in one of the usual forms than in the case of mortgages of land to an individual, but some of the reasons still remain. It is difficult to see any real unfairness in a normal commercial agreement
C between a company and, for example, an insurance society for a loan to the former on the security of its real estate for a very prolonged term of years. Both parties may be equally desirous that the mortgage may have the quality of permanence. There is a great deal to be said in such a case for freedom of contract.

D I do not think that there is any strong argument for suggesting that sect. 74 of the Act of 1929, or any of its predecessors, ought, by reason of its nature, to be confined to what may be called ordinary debentures. As we have seen, some definition was certainly desirable, and the very wide terms used by the legislature in the Act of 1928 and reproduced in
E the consolidating Act of the following year seem to me to show that it was intended to give freedom of contract as regards the particular matter involved in sect. 74 in relation to any securities granted on loan by a company registered under the Companies Acts. It is contended that the context otherwise requires. I am unable to find any such context. It
F is, of course, true that some of the sects. 73-78, which are to be found under the heading "Special provisions as to debentures," are not dealing with mortgages of land by a company to an individual. Sect. 73, for example, is apparently dealing with debentures issued in a series and registered. Sect. 75 is, perhaps, also limited in the same way. It does
G not seem to me, as at present advised, that sect. 76 and sect. 78 require any such qualification. We are dealing with an Act in which the word "debenture" is used in numerous sections, and, it must be admitted, in more than one sense. The practice of inserting a definition in such a case has often been criticised. It was described by BLACKBURN, J., in
H *Lindsay* v. *Cundy* (8), at p. 358, as a modern innovation which frequently does a great deal of harm, and by LORD ST. LEONARDS, L.C., in *Ely* (*Dean*) v. *Bliss* (9) as an attempt to put a general construction on words which, in the different senses in which they are introduced in the various clauses of an Act, do not admit of such. It is probably too late to add to these and other complaints. All we can do is to see whether the interpretation

clause in this case can reasonably be applied to sect. 74 without leading to any startling result, and whether there is any context which requires us to reject some of the words of the definition. The fact that a particular section contains a provision relating to a particular kind of debenture does not assist us. We do not, for example, use the word "man" in a restricted sense if we make a statement about white men. "Men" A
has its ordinary meaning. It is the word "white" which qualifies the statement and makes it applicable to some men only. So here sect. 74 itself applies only to debentures creating a charge. That is because the section applies only to debentures creating a charge capable of being redeemed. It is not a reason for holding that a security of a company B
creating a mortgage of land is not a debenture within sect. 74. Finally, it should be noted that the mortgage with which we are concerned on the present appeal could without difficulty have been drafted in the form of an ordinary company debenture with a charge on its face, followed by the provisions as to the instalments by which it is to be paid off, and, C
if desired, with the various conditions and provisos printed on the back. For these reasons, I am of opinion that the word "debentures" in sect. 74 must be given the meaning attached to it by sect. 380.

The contention that the rule against perpetuities applies to the mortgage has not been very strongly urged by counsel for the appellant, who D
candidly admitted that he raised the point because the reason often given for exempting mortgages from the rule against perpetuities was that a condition in a mortgage precluding redemption for over 21 years would be void in equity. Both LUXMOORE, J., and the Court of Appeal pointed out that the rule has never been applied to mortgages, and they E
declined to depart from the established view that mortgages were not within the rule. In my opinion, they were justified in taking that course. I will only add that, since the Law of Property Act, 1925, came into force, it seems to be more difficult than ever to invoke the rule in the case of mortgages. Where, as in the present case, there is a mortgage F
term for 3,000 years, with a statutory provision for cesser of the mortgage term on discharge of the money secured by the mortgage, it would seem difficult to consider the case as being within the rule. In saying this, I do not wish to throw any doubt upon the view that mortgages before 1926 were an exception to the rule. G

My Lords, the question remains whether, accepting the view that the Companies Act, **1929**, s. 74, applies, the appellants can obtain a declaration that they are entitled, on the usual notice, to redeem the mortgage upon payment of principal, interest and costs. In my judgment, the section establishes that the fact that the mortgage is made H
irredeemable for 40 years is not itself a ground for the application of the rule of equity, assuming that, but for the section, it would apply. I am not forgetting the words "by reason only that the debentures . . ." but the word "only" does not, I think, detract from the fact that the main ground for attack on the present mortgage is the length of time

which must elapse before the right of redemption will exist, according to its terms. Apart from the provision postponing the right of redemption, there would be no objection to the mortgage. The word "only" in the section leaves open for consideration by the court cases where there has been hardship or oppression by the mortgagee, but I am unable A to take the view in this case that the terms of the mortgage are so stringent, and the restrictions which it imposes on dealings by the appellants with the mortgage properties are so oppressive, that these matters, read in the light of the provisions of sect. 74, would justify the interference of the court. In this connection, it is right on the question B of hardship to take into account the circumstances in which the mortgage was entered into, the great experience of the solicitors on both sides, and the care with which the negotiations were conducted. The appellants executed the mortgage with their eyes wide open. In such a case, the court in these days must be slow to interfere with a contract C deliberately entered into, and, having regard to the view above expressed as to sect. 74 and its consequences, I must come to the conclusion that the appellants' claim to redeem contrary to the terms of the mortgage must fail. For these reasons, I am of opinion that the appeal should be dismissed with costs.

D

LORD ATKIN: My Lords, I have had an opportunity of reading in advance the opinion which has just been delivered by my noble and learned friend **VISCOUNT MAUGHAM**, and also the opinion which is about to be delivered by my noble and learned friend **LORD ROMER**. I agree E with them, and I have nothing to add.

LORD WRIGHT: My Lords, I also have had a similar advantage. I agree with the opinion of my noble and learned friend **VISCOUNT MAUGHAM**, and with that about to be delivered by my noble and learned friend **LORD ROMER**.

F **LORD ROMER**: My Lords, at the conclusion of the interesting arguments of counsel for the appellants, it became clear that it was desirable to ascertain in the first place whether the mortgage of Nov. 6, 1931, was a debenture within the meaning of the Companies Act, 1929, s. 74, and, if that question be answered in the affirmative, whether G the claim of the appellants to be entitled to redeem the mortgage at the present time must not necessarily fail in view of the provisions of that section. Your Lordships accordingly requested counsel for the respondents to confine his argument to those particular questions. I understand that, on due consideration of the arguments on the one H side and the other, all your Lordships have come to the conclusion that both the questions should be answered adversely to the appellants. In that conclusion I concur, and will now state quite shortly my reasons for so doing.

The Companies Act, 1929, s. 74, provides as follows:

> A condition contained in any debentures or in any deed for securing any

> debentures, whether issued or executed before or after the commencement of this Act, shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

The history of this section is set forth by LUXMOORE, J., in his judgment in the present case. Shortly stated, the history is as follows. It first appeared in substantially the same form as now in the Companies Act, 1907, s. 14, and it was repeated in the Companies Act, 1908, s. 103. LUXMOORE, J., has examined those Acts, and has given reasons which, to my mind, are conclusive for thinking that an ordinary mortgage of freehold property was not a debenture, or a deed for securing debentures, within the meaning of those sections. As was said in BUCKLEY, LAW AND PRACTICE UNDER THE COMPANIES ACTS, 11th Edn., p. 174:

> No one seems to know exactly what "debenture" means.

As "no one" in this passage presumably included LORD WRENBURY himself, I am not ashamed to say that it certainly includes me. This much, however, I can say without hesitation. The word "debenture" as ordinarily employed in legal and commercial circles did not in 1908 include an ordinary mortgage of land. When, therefore, the Companies Act, 1908, s. 103, was reproduced word for word in sect. 74 of the Act of 1929, the conclusion to which one would have come at first sight would have been that it was not the intention of the legislature to bring such a mortgage within the operation of the last-mentioned section. This conclusion would have been strengthened by a consideration of the other provisions of the 1929 Act, until one arrived at the definition of the word "debenture" contained in sect. 380. It is to be observed, for instance, that sect. 74 is contained in Part II of the Act, the heading of which is "Share capital and debentures," and which contains (sect. 34) provisions relating to prospectuses inviting persons to subscribe for shares in, or debentures of, a company, provisions (sect. 63) as to the transfer of shares in, or debentures of, the company by a proper instrument of transfer, and provisions (sect. 67) as to the issue of certificates of shares, debentures, and debenture stock allotted or transferred—provisions which scarcely seem applicable to ordinary mortgages of land. Then, again, sect. 74 itself forms one of a *fasciculus* of sections under the heading "Special provisions as to debentures," the first of which sections confers upon the registered holder of any debentures and any shareholder of the company, but apparently upon no one else, a right of inspecting the register of holders of debentures. This may usefully be contrasted with the provisions in sect. 82 (3), which give a right of inspection of the register of charges to any member of the public who cares to pay the prescribed fee for the privilege. It might, too, have been reasonably expected that, if sect. 74 was intended to apply to an ordinary mortgage of land, it would have appeared in Part III of the Act, which is dealing with the registration of charges—a word which includes mortgages (sect. 79 (10) (*a*))—rather than in Part II, so many of the provisions of which are inapplicable to an ordinary mortgage of land.

Sect. 380 of the Act, however, provides that, unless the context otherwise *requires*, the expression "debenture" in the Act includes:

> . . . debenture stock, bonds and any other securities of a company whether
> A constituting a charge on the assets of the company or not. . .

The considerations to which I have referred certainly arouse a suspicion in my mind that, when enacting sect. 74 of the Act, the legislature had not ordinary mortgages of land in its contemplation. I find it quite impossible, however, to say that those considerations *require* that such
B mortgages should be excluded from the operation of the section. When applied to such mortgages, the provisions of the section are quite sensible. They involve no absurdity and no inconsistency. On the contrary, if it be thought desirable that debentures in their popular meaning may be made irredeemable, it would seem to be both absurd and in-
C consistent to forbid a company to make its ordinary mortgages of land also irredeemable. I can find no legitimate reason for not attributing to the word "debentures" in sect. 74 the meaning given to it by sect. 380.

The reason which induced LUXMOORE, J., to come to the opposite conclusion was this. Regarding the Act of 1929 as being—as, indeed,
D it is—a consolidating statute, he rightly said that it must be construed ordinarily so as to exclude any amendment of the previously existing law. His attention, however, was not drawn to the Companies Act, 1928. That was an amending Act passed with a view to the consolidation of the law which was effected by the Act of 1929, and one of
E the amendments made by the Act of 1928 was an amendment of the definition of the word "debenture" contained in sect. 285 of the Act of 1908. As a matter of fact, the legislature had not in that section attempted to do what no one had succeeded in doing before—namely, give an exhaustive definition of the word "debenture." It contented
F itself with saying that "debenture" includes debenture stock. Then came the Act of 1928, in which a number of minor amendments to sections of the 1908 Act were set out in Sched. II. Among them was this:

> Sect. 285. At the end of the definition of debenture there shall be added the words "bonds and any other securities of a company whether constituting a charge
> G on the assets of the company or not."

Hence the "definition" of debentures in sect. 380 of the consolidating statute of 1929.

It was contended on behalf of the appellants, however, that the words "any other securities" should be construed as referring only to securities
H *ejusdem generis* as the genus to which debentures belong. All I can say about this is that, if no one seems to know exactly what "debenture" means, no one can be expected to know what is *ejusdem generis* with it. Indeed, the very fact that no one seems to know exactly what "debenture" means indicates pretty plainly that "debenture" is itself the name of a genus, and not of a species. In my opinion, the words

"any other securities" mean what they say, and include all other securities of any kind whatsoever.

It was finally urged on behalf of the appellants that they are not attacking the provisions of the mortgage of Nov. 6, 1931, by reason only of the fact that it is irredeemable until the expiration of a period too remote, but by reason of the other conditions contained in the mortgage when read in combination with the postponement of the right of redemption. It is quite plain, however, that what the appellants are complaining of is the denial of their right to redeem at the present time, and that the materiality of the other conditions to which they called your Lordships' attention is merely that their existence renders it essential for the appellants if they can possibly do so, to redeem forthwith. If it were not for the conditions in the mortgage making it irredeemable until the expiration of 40 years from its date, the appellants would have no cause of complaint. For these reasons, I am of opinion that this appeal should be dismissed with costs.

Lord Porter: My Lords, I concur.

Appeal dismissed with costs.

Solicitors: *Clifford-Turner & Co.* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Bremner, Sons & Corlett*, Liverpool (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

R. v. RECORDER OF BURNLEY, *Ex parte* NEW EMPIRE (BURNLEY), LTD.

[King's Bench Division (Hawke, Charles and Hilbery, JJ.), **April 9, 1940.**]

Courts—Borough quarter sessions—Recorder—Custom for magistrates to sit with recorder—Validity of proceedings.

At the hearing of an appeal against the valuation of a cinema theatre, the recorder of the borough, sitting as sole judge, was accompanied on the bench by a local magistrate, who did not assist the recorder in adjudicating upon the appeal, but on one occasion, as an accountant, suggested a question to the recorder, who invited counsel to put it to the witness. As counsel did not ask it, the recorder put it himself. The recorder heard the case at great length, and reserved his decision for months. It was now sought on this ground to challenge the regularity and legality of the recorder's exercise of his functions and duties:—

Held: the presence of the borough magistrate on the bench and the fact that he suggested a question to the recorder had in no way influenced the recorder's decision. He had exercised his functions and duties as recorder in a regular and legal manner, and the objection taken was without foundation.

[EDITORIAL NOTE. In boroughs having the franchise of a separate court of quarter sessions, the recorder is the sole judge of the court, but it has long been the custom for some of the local magistrates to sit with him on the bench. It has been said that this is a matter of courtesy, and it is certainly well understood that the magis-

trates have no right whatever to take any part in the determination of the cases heard. The legality of this custom does not seem to have been questioned in any previous case, and the present case goes one step further than to decide its legality, for it is held that, although the magistrate here suggested a question which might be put to a witness, this did not amount to taking any part in the proceedings.

As to Recorders, see HALSBURY, Hailsham Edn., Vol. 8, pp. 616, 617, para. 1339; and for Case, see DIGEST, Vol. 33, pp. 287, 288, No. 36.]

Rules *nisi* for writs of *certiorari* and *mandamus* for the purpose of removing and quashing a certain provisional rating valuation list. The facts are fully set out in the judgments. The applicants raised several contentions, the decision on only one of which calls for a report.

J. W. Stansfield for the applicants.

C. Erskine Simes for the respondents.

Hawke, J.: In the opinion of this court, there is nothing in the contention that the powers and duties of this court of quarter sessions were not exercised by the recorder as sole judge, because the recorder sat, as recorders have done since time immemorial, with a local magistrate sitting beside him. It has been known to everybody who has acted as recorder for any time in any borough of any importance whatever that local magistrates like to sit with the recorder, out of what has been called in this case courtesy. If counsel for the applicants could show that the recorder's judgment was influenced by anything which this magistrate said, in my humble opinion, speaking for myself, I think that this court agrees that then we should have had to consider that very carefully, and in all probability we should have granted some, if not the whole, of the relief for which he asks. We are shown by the shorthand note of the proceedings that, during the re-examination by counsel for the applicants of a witness called for the appellants at quarter sessions, the recorder said: "Would you ask a certain question?" Let me take it that he said as much as this, although I do not think that he did: "Would you ask a certain question? A gentleman, who is an accountant, is sitting next to me, and he has rather suggested to me a question. I want the answer to it. Will you ask it?" Counsel did not refuse to put the question to the witness, but did not actually do so. Thereupon the recorder asked it himself. How are we to begin to believe that that has influenced his decision? He says in his affidavit that it did not. He has pointed out to us that he heard this case, as we can see, at great length, and that he reserved his decision for months. Nobody suggests that this trespassing magistrate, if one can use that expression, went and spent a month or two with the recorder whilst he was dealing with this matter. In other words, in our view, this is a point of no substance whatever.

Charles, J.: The objection taken was that the recorder did not act as sole judge of the court because he

> . . . was accompanied on the bench and assisted by one Frederick Augustus Hargreaves, a magistrate for the county borough of Burnley.

That, of course, has to be supported by affidavit, and one would suppose that the deponent would have been very careful to put into that affidavit what in fact happened. He did nothing of the sort. It is because he did nothing of the sort that I think I ought to call attention to it. Let us see what he says:

> During the whole of the hearing [he was not present during the whole of the hearing] the learned recorder was accompanied on the bench by a gentleman who sat next to him and who took an active part in the proceedings. From time to time the proceedings were interrupted while the learned recorder conversed with this gentleman and questions [not "a question"] appeared to be put to various witnesses by the recorder as a result of such conversations. During the time when the secretary of the applicant company was giving evidence this was particularly noticeable, and when the applicants' accounts were produced they were perused by the learned recorder and this gentleman together.

Let us see what the truth is. The recorder states in his affidavit, which we have had an opportunity of comparing with the shorthand notes:

> In accordance with the usual custom, a magistrate of the borough accompanied me on the bench as a matter of courtesy. He did not assist me in adjudicating upon the appeal, and in fact I reserved my judgment, which I did not deliver until I had had an opportunity of perusing the transcript of the proceedings and a list of the films exhibited at the three No. 1 cinemas owned by the appellant company in Burnley, which it was agreed by counsel for the appellants and respondents should be supplied to me. During the evidence of Mr. McCracken, the secretary of the applicant company, the magistrate asked me a question on the accounts of the applicant company which were being dealt with by the witness, and, as appears from the transcript of the shorthand notes of the proceedings, I immediately informed counsel as to the question. The magistrate took no other part in the proceedings, and no objection was made by counsel for the appellants.

That is the truth, and that which appears in the other affidavit is, I regret to say, not true. I agree that the result must be as HAWKE, J., has said.

HILBERY, J.: I think it perhaps desirable that I should say a few words as to what is my view, because this is a case in which a wholly unjustifiable attack has been made upon a recorder. It is objected here that the way in which the recorder exercised his function and duties as recorder of the borough of Burnley was irregular and illegal.

It has been asserted that a magistrate—disqualified, of course, either to sit, or to hear, or to determine this matter—sat with the recorder, and it was asserted that that magistrate, accompanying the recorder on the bench, actually so participated in the hearing and the determination that the determination of the matter was not the determination of the recorder, who alone had jurisdiction to determine the appeal. I can only say that suspicion of such a thing, I should have thought, would not even have occurred to a person of experience in the practice of the law, even from the circumstance which is set out in the affidavit here as sworn by the solicitor in support of this application. When one observes what is stated by the recorder in his affidavit, and when one refers to the shorthand note to see what actually occurred at the trial—a matter which I need not reiterate, because both HAWKE and CHARLES, JJ., have already stated what appears there—the suggestion

that there was any participation by this magistrate in the hearing or in the determination of this matter becomes as apparently without foundation as are all the other objections taken before us. The recorder has stated to us, and has stated with perfect frankness, that there was an occasion, as is shown in the shorthand note, when he asked a question
A and told the parties that he had sitting beside him a magistrate who was an accountant, but he informs us, and his judgment clearly indicates, that he alone heard and considered and determined the matter, and that this magistrate, sitting there as a matter of courtesy with him, did nothing which amounted to any interference with, or sharing of,
B the duties of the recorder in hearing and determining this case. I agree with HAWKE and CHARLES, JJ., that this application must be dismissed.

Rules discharged with costs.

Solicitors: *Peacock & Goddard*, agents for *Percy H. Barker & Co.*, Manchester (for the applicants); *Kenneth Brown, Baker, Baker*, agents
C for *Harry Plowman*, Town Clerk, Burnley (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

D

Re GAUMONT-BRITISH PICTURE CORPORATION, LTD.

[CHANCERY DIVISION (Crossman, J.), **April 8, 1940.**]

Companies—Accounts and audit—Inspector appointed by Board of Trade—Examination of officer of company—Refusal of officer to answer questions in presence of shorthand writer—Whether presence of shorthand writer
E *reasonably necessary—Companies Act,* 1929 (c. 23), *s.* 135 (1), (3), (4), (5), (6).

An inspector appointed by the Board of Trade under the Companies Act, 1929, s. 135 (1), to investigate the affairs of a company arranged for the examination of the managing director. A shorthand writer was present to take a note of the proceedings for the inspector's use, where-
F upon the managing director objected to his presence and refused to answer any questions while he remained, on the ground that under the section there was no authority for the presence of a shorthand writer:—

HELD: the presence of the shorthand writer was reasonably necessary to enable the inspector properly to carry out his duties under the Act. The managing director was, therefore, not justified in refusing to answer questions, and was in effect guilty of contempt of court.

G

[**EDITORIAL NOTE.** The House of Lords decided in *Hearts of Oak Assurance Co., Ltd.* v. *A.-G.* (1) that at a statutory inquiry which was not to be held in public there might yet be present all such persons as were reasonably necessary to enable the person conducting the inquiry to carry out his duties in a proper and efficient manner. It was here objected that the presence of a shorthand writer at an
H inquiry into a company's affairs under the Companies Act, 1929, s. 135, made the inquiry a public one, but this contention is rejected, and it is held that the shorthand writer was one of those persons whose presence was reasonably necessary for the proper conduct of the inquiry within the decision of the House of Lords in the above case.

AS TO INQUIRY by INSPECTOR UNDER COMPANIES ACT, 1929, s. 135, see HALSBURY, Hailsham Edn., Vol. 5, pp. 386, 387, para. 635; and FOR CASE, see DIGEST, Vol. 9, p. 587, No. 3933.]

Cases referred to:

(1) *Hearts of Oak Assurance Co., Ltd.* v. *A.-G.*, [1932] A.C. 392; Digest Supp.; 101 L.J.Ch. 177; 147 L.T. 41.

(2) *Re Grosvenor & West End Railway Terminus Hotel Co., Ltd.* (1897), 76 L.T. 337; 16 Digest 388, *2290*.

Motion by an inspector appointed by the Board of Trade to investigate the affairs of Gaumont-British Picture Corporation, Ltd., pursuant to the Companies Act, 1929, s. 135, asking the court to inquire into the refusal of the respondent, Mark Ostrer, the managing director of the company, to answer any questions put to him by the applicant as such inspector, and otherwise to inquire into the case. The substantial question at issue was whether the inspector was entitled to have the assistance of a shorthand writer, the objection being that his presence was not compatible with the private nature of the proceedings. The facts are fully set out in the judgment.

The Companies Act, 1929, s. 135 (1), provides as follows:

> The Board of Trade may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the board direct..

Subsect. (3) provides as follows:

> It shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.

Subsect. (4) provides as follows:

> An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.

Subsect. (5) provides as follows:

> If any officer or agent of the company refuses to produce to the inspectors any book or document which it is his duty under this section so to produce, or refuses to answer any question which is put to him by the inspectors with respect to the affairs of the company, the inspectors may certify the refusal under their hand to the court, and the court may thereupon enquire into the case, and after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, punish the offender in like manner as if he had been guilty of contempt of the court.

Subsect. (6) provides as follows:

> On the conclusion of the investigation the inspectors shall report their opinion to the Board of Trade, and a copy of the report shall be forwarded by the board to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them. The report shall be written or printed, as the board direct.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *A. Andrewes Uthwatt* for the applicant.

C. E. Harman, K.C., and *H. C. Marks* for the respondent.

Crossman, J.: This is a motion by the inspector appointed to investigate the affairs of Gaumont-British Picture Corporation, Ltd. The inspector was appointed by the Board of Trade on an application by the necessary proportion of the shareholders of the company on July 31, 1939. On Jan. 10, 1940, he summoned Mark Ostrer, the respondent to the present motion, before him for examination, and the examination was thereupon commenced. The result of that was embodied in his report, which was made on Feb. 5, 1940, as follows :

> I, Russell Kettle, of 5, London Wall Buildings, Finsbury Circus, in the city of London, chartered accountant, being the inspector appointed by order of the A Board of Trade dated Jan. 31, 1939, to investigate the affairs of the above-named company and to report thereon in such manner as the board may direct hereby certify to this court as follows : (1) As such inspector I arranged pursuant to the Companies Act, 1929, s. 135, for the examination on Jan. 10, 1940, at the company's offices of Mr. Mark Ostrer of 142-150 Wardour Street, London, W.1, the managing director of the company. (2) On that day Mr. Mark Ostrer accompanied by Mr. W. B. Robinson, the secretary of the company (who had been summoned for B examination under the same section), attended at the company's offices for examination. In accordance with arrangements made by me a representative of Messrs. Cherer & Co., shorthand writers, was present with the object of taking for my use a shorthand note of the proceedings and of supplying me with a transcript thereof. (3) Mr. Mark Ostrer objected to the presence of a shorthand writer and said that neither he nor Mr. Robinson was prepared to be examined if anyone was in the room besides myself. He gave two reasons for his objection—(i) that under sect. 135 there was no authority for the presence of a shorthand writer, and (ii) that, C as the examination would involve the disclosure of private information concerning the company's private affairs, he was not prepared for the information to be divulged to a third party. I asked Mr. Ostrer how he suggested the proceedings should be recorded, and he said that I would have to write them out in longhand. I told him that in my opinion his attitude was unreasonable, in that such a course was impracticable, in view of the extent and nature of my proposed examination, and not in accord with ordinary business procedure. I added that, even assuming D I myself made the notes, they would subsequently be typed in my own office. He refused, however, to proceed with the examination if I insisted that a shorthand writer should be present. I told him he left me no alternative but to withdraw and report the matter to the court. (4) It was also my intention, as I explained to Mr. Mark Ostrer, for my representative in charge of the investigation to be present solely for the purpose of facilitating my reference to papers and thus expedite the examination, and I told him that my representative would, in any event, become acquainted with the proceedings. Mr. Ostrer, however, said he E could not agree, and I did not press for my representative's attendance.

That is the report, and, as I understand the effect of the evidence which has been filed on this application—there is an affidavit of the applicant, and also an affidavit of Mark Ostrer—that report is accepted and represents the facts. The fact is that Ostrer refused to answer a question as F long as any person other than the inspector was in the room. The question is whether he was justified in doing that. Counsel for the respondent relies solely upon the proposition that the inspector had no right to have a shorthand writer in the room during the examination. With that contention I am quite unable to agree. It seems to me G perfectly plain, in view of a decision to which I will refer in a moment, that there is no reason why the inspector should not have in the room any person whose presence is reasonably necessary for the proper performance of his duty. If it is a fact that a shorthand writer to take down the proceedings as a record for the inspector's use in preparing H his report is necessary, then it seems to me that there is no question but that the inspector is entitled to have the shorthand writer present.

Conveniently in this case I have the advantage of the decision of the House of Lords in *Hearts of Oak Assurance Co., Ltd.* v. *A.-G.* (1) to assist me. That was a decision under a different Act of Parliament, and not in the same language, but, fortunately for me, the House of Lords dealt with it by reference to the Companies Act, 1929, s. 135. I am able to use that as a parallel case which shows the meaning of the proviso with regard to such examination as took place under this section. What was decided in that case was that an examination under the Friendly Societies Act, 1896, and the Industrial Assurance Act, 1923, is not a legal proceeding, and ought to be held in private. In that case Lord Thankerton said, at p. 398:

> The nearest analogy to the present case is to be found in the Companies Act, 1929, s. 135, under which the Board of Trade is entitled to appoint inspectors to investigate the affairs of a company and to report thereon; the provisions are very similar, except that the Board of Trade can only so act on the application of a prescribed number of shareholders, and that if the board, on receipt of the report, are of opinion that an offence has been committed they are to refer the matter to the criminal authorities. It has been held that an investigation under the corresponding provisions of the Companies Act, 1862, is not a judicial proceeding: see *Re Grosvenor & West End Railway Terminus Hotel Co., Ltd.* (2). The reasons against publicity in such an investigation would be equally strong in my opinion.

On that, the House came to the conclusion that it was not right to hold an inquiry under the Industrial Assurance Act, 1923, in public, and that it ought to be held in private, but they accepted and made part of the order of the House the following declaration [p. 406]:

> Declared that an inspector appointed by the Industrial Assurance Commissioner under the Industrial Assurance Act, 1923, s. 17 (1), for the purpose of examining and reporting on the affairs of the plaintiffs is not entitled to conduct the inspection in public, but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him properly to carry out his duty under the statute . . .

It seems to me that exactly the same thing applies here, and that that covers this case. What I have to consider is simply the question whether the presence of the shorthand writer is something which is reasonably necessary to enable the inspector properly to carry out his duty under the statute. I come to the conclusion here without any hesitation that it is necessary to enable him to do it. It is not for the purpose of recording it and publishing it, or anything of that kind. It is for the purpose of enabling the inspector to prepare his report. When he comes to prepare his report, he wants a record of what has occurred, and the shorthand note is for that purpose. To have a shorthand writer in his room for his own purposes, and not as a public shorthand writer, to enable him to have a record of, and to bear in mind, what has in fact been said, and what the evidence is, is, in my view, reasonably necessary to enable him properly to carry out his duty under the statute. In this case, Ostrer refused to answer any questions simply because of the presence of the shorthand writer, who, in my view, was entitled to be present. Therefore, he was completely unjustified in refusing to answer the questions, and he is, in effect, in the same position as if he had been guilty of contempt of court, having regard to sect. 135 (5). In those circumstances, having regard to the fact that he has in his evidence and by his counsel apologised for what amounts to a contempt of court, conditional upon its being held that he is in fact wrong, I do not think that I ought to take any step in the nature of punishment beyond the step of ordering him to pay the costs of the proceedings.

Solicitors : *Solicitor to the Board of Trade* (for the applicant) ; *Lawrance, Messer & Co.* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

PAGE *v.* SKELT.

[COURT OF APPEAL (Clauson and Luxmoore, L.JJ.), **April 9, 1940.**]

Emergency Legislation—Settlement after commencement of Act of action commenced before commencement of Act—Agreed sum to be paid by instalments with liberty to sign judgment on default—" Judge's order if necessary" —Default in payment of instalment—Judgment for balance of claim—Whether leave of court necessary to proceed to execution—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (1) (*b*).

In Apr., 1939, the plaintiff issued a writ claiming from the defendant a sum of £2,225 as money had and received. When the action was about to come on for trial, terms of settlement were arrived at by which the defendant admitted liability for part of the sum claimed—namely, £1,324 11*s.* 2*d.*—and agreed to pay this amount by instalments. It was provided that, in the event of any instalment remaining unpaid within 3 days after the due date, the plaintiff should be at liberty to sign judgment for the balance then outstanding and " Judge's order if necessary." These terms were approved by the judge with the addition of the words " Liberty to apply." The defendant having subsequently failed to pay an instalment, the plaintiff, on Feb. 22, 1940, applied to the judge in pursuance of the terms of settlement and obtained judgment for the balance outstanding—namely, £1,149 11*s.* 2*d.* The plaintiff then applied to the master under the Courts (Emergency Powers) Act, 1939, s. 1, for leave to enforce that judgment. Leave was given on terms, but on appeal to the judge on the question of the terms imposed, it was held that the judgment came within the proviso in sect. 1 (1) (*b*) of the Act, as being a judgment on a contract entered into after the commencement of the Act, and that the plaintiff was entitled to proceed to execution without the leave of the court :—

HELD : the judgment was not a judgment for the recovery of a debt which had become due by reason of the contract of settlement, but was a judgment for the recovery of the balance of the debt claimed by the writ. The matter did not, therefore, fall within the proviso in sect. 1 (1) (*b*) of the Act, and the leave of the court was necessary to proceed to the enforcement of the judgment.

[**EDITORIAL NOTE.** The Courts (Emergency Powers) Act, 1939, does not apply to contracts made after the commencement of the Act. The question here is whether a settlement of an action in the nature of a compromise entered into after the Act is a contract to which the Act does not apply, or whether it can be referred back to the commencement of the action, that being before the commencement of the Act. It must be noted that in the present case liberty was reserved to the plaintiff to apply to the court and obtain an order for judgment to be entered for so much of the money due under the settlement as should be outstanding at the time of the application. It may be that, to secure the advantages of the Act, it is necessary to effect the settlement in this way.

AS TO LEAVE TO ISSUE EXECUTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13 ; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

Interlocutory Appeal by the debtor from an order made in chambers by Oliver, J., on Mar. 13, 1940. The plaintiff obtained judgment on Feb. 22, 1940, and on Mar. 8, 1940, Master Simner made an order in chambers that the plaintiff be at liberty under the Courts (Emergency Powers) Act, 1939, s. 1, to issue execution on, or otherwise proceed to the enforcement of, the judgment. He assessed costs, and suspended leave provided that the defendant paid to the plaintiff £10 per month, the first payment to be made within 14 days. On appeal by the plaintiff, the judge gave the plaintiff liberty to proceed unconditionally under the Courts (Emergency Powers) Act, 1939, s. 1. The defendant appealed, asking for the restoration of the master's order. The facts are fully set out in the judgment of Clauson, L.J.

Robert Fortune for the appellant.

C. L. Henderson for the respondent.

Clauson, L.J.: In the month of Apr., 1939, the plaintiff issued a writ against the defendant claiming a sum of £2,225 for money had and received by the defendant as solicitor for and on behalf of the plaintiff. On Feb. 22, 1940, Tucker, J., ordered, and on the same day the order was complied with, that judgment be entered for the plaintiff for £1,149 11*s.* 2*d.* and certain costs. The order was drawn up in the proper form: "It is this day adjudged that the plaintiff recover from the defendant [that sum]." On that statement, with nothing more, it would appear to be plain that the judgment so adjudged on Feb. 22, 1940, was not a judgment for the recovery of a debt which became due by virtue of a contract made after the commencement of the Courts (Emergency Powers) Act, 1939—Sept. 1, 1939—and, accordingly, if that was all that was in the case, the result would have been that the plaintiff could not proceed to execution of, or otherwise enforce, that judgment without the leave of the appropriate court. The plaintiff applied for leave, and the master, taking the view that the Courts (Emergency Powers) Act, 1939, applied to the case (as, on the very jejune statement I have made up to this moment, seems to me to be quite plain), made an order giving leave to proceed on certain terms, with the details of which it is not necessary to trouble. The plaintiff, not being satisfied with those terms, appealed to the judge, who took the view, for reasons which will appear when I state the facts at greater length, that this was a judgment for the recovery of a debt which had become due by virtue of a contract made after the commencement of this Act, and, accordingly, took the view that there was nothing to prevent the plaintiff from proceeding to the enforcement of his judgment. The matter being, by virtue of that subsection, wholly outside the purview of the Courts (Emergency Powers) Act, 1939, the order was drawn up in the form of giving leave to proceed to enforcement under sect. 1 of the Act. That is *per incuriam*. The point of it is that the judge held that there was nothing to prevent the plaintiff from proceeding to enforce his judgment. There is now an appeal by the defendant to us, and he asks us to say that the judge was wrong in holding that the case did not come within that Act, and that accordingly either the order of the master which gave only conditional leave to proceed to enforcement should be restored, or some opportunity should be given, if necessary, for the terms of that order to be reconsidered. Anyhow, the point made by the appellant is that the judge was wrong in holding that the judgment in question came within the proviso.

I must now proceed to state somewhat more fully what has occurred. The writ, as I have stated, was issued claiming £2,225. There were pleadings in the usual way, but I do not think that it is necessary to go into the details of the claim. When the matter was about to come on for trial before TUCKER, J., on Dec. 11, 1939, counsel having met, terms of settlement were come to in a form which is very familiar according to the practice of the King's Bench Division. The real importance of the matter is that we are asked to construe these terms. That involves construing, and giving an opinion upon, the effect of a scheme for settling an action, which is an everyday occurrence in the King's Bench Division, and, for that reason, it is most desirable that the matter should be dealt with on principle, and correctly. The terms of the settlement are these, so far as it is necessary to refer to them for the present purpose. By para. 1, the defendant (who had been sued, it will be borne in mind, for £2,225) admits that he is indebted to the plaintiff in the sum of £1,324 11*s.* 2*d.*, and agrees to pay the plaintiff the sum of £100 towards his costs. It is perhaps superfluous to point out that those words mean that he is indebted in the sum of £1,324 11*s.* 2*d.* in respect of the liability which, in the writ, the plaintiff claims to be a liability which entitled him to payment of the larger sum of £2,225. The defendant says: "I am not liable for the £2,225, but, in respect of the subject-matter of this action, I am liable for £1,324 11*s.* 2*d.*, and that I admit." By para. 2, the plaintiff agrees to accept payment of the amount of the costs and the agreed debt by certain instalments. By para. 3, it is agreed that, until the total moneys have been paid, the plaintiff is to be entitled to hold certain securities, with the details of which it is not necessary to trouble. By para. 4, the plaintiff agrees that, upon the total moneys mentioned in para. 1—namely, the £1,324 11*s.* 2*d.*—being paid to him, he will, at the expense of the defendant, transfer the securities. Then comes para. 5, which is as follows:

> In the event of any of the instalments mentioned in para. 2 hereof being unpaid within 3 days after the due date of payment the plaintiff will be at liberty to sign judgment for the whole of the balance then outstanding and on the happening of that event the plaintiff shall hold the aforesaid equitable sub-mortgages as collateral security until the whole amount of the judgment obtained is satisfied. Judge's order if necessary.

Those terms were settled between counsel and were reduced into writing. The matter was then mentioned to TUCKER, J., who was told, no doubt,

that the matter had been settled upon agreed terms, and there is a note of the terms of settlement which both counsel agree represents accurately the terms approved by TUCKER, J., with the addition of the words: "Liberty to apply." Thus, the terms of settlement were those which I have read or summarised, with the addition of the words: "Liberty to apply." What happened afterwards was this. Certain instalments A
were paid, which would, of course, as nobody disputes, go in diminution of the £1,324 11*s*. 2*d*. Then, at the moment when an instalment was due and was not paid within what one may call the days of grace, the plaintiff had to make up his mind what he would do. What he did was to apply to the judge in chambers, who happened to be TUCKER, J., and B
ask, in pursuance of the right given to him by the terms of the settlement, for such judge's order as was required in order to enable the plaintiff (as it is said, not quite accurately) to sign judgment for the whole of the balance outstanding. The application was really for a judge's order to enable judgment to be entered for the balance out- C
standing. I think that that is a mere technical inaccuracy about which we obviously need not trouble. The plaintiff went before TUCKER, J., when, though it is not material, the defendant was not represented. In any case, the judge ordered that judgment be entered for the plaintiff for the sum which, on the evidence produced before him, was, as he D
was satisfied, the balance then outstanding—namely, £1,149 11*s*. 2*d*. Accordingly, the proper officer of the court under that order drew up the formal order adjudging that the plaintiff should recover from the defendant the sum of £1,149 11*s*. 2*d*., that order being made in the action commenced by the writ, as I have stated. E

It is true in a sense to say that it was by virtue of the terms of the settlement and the contract there made between the plaintiff and the defendant through their counsel that the figure to be recovered in the action was quantified at a figure which, having regard to the subsequent payments, became the £1,149 recorded upon the judgment. It is true F
to say that the figure for which the parties were bound to permit the judge to give judgment was reached through settlement having been made. In the judgment, however, what does that figure mean? That figure means that the court adjudged, as I understand it, that, in respect of the claim made in the writ, the sum to be recovered, having regard to G
everything which has supervened in the course of the action, is to be, not the sum claimed in the writ, but £1,149 11*s*. 2*d*. Accordingly, that judgment is a judgment, not for the recovery of a debt which has become due by reason of the contract of settlement, but for the recovery of so much of the debt claimed by the statement of claim in respect of a H
liability accrued before the commencement of the Courts (Emergency Powers) Act, 1939, as now remains owing and for which it is proper for the court to give judgment in favour of the plaintiff. In other words, the case does not, in my view, fall within the proviso at all. The Courts (Emergency Powers) Act, 1939, applies to it, and some such order as

the master made—whether or not the terms are right ones may be a matter for discussion—was properly made. It will be observed that in coming to that conclusion I have come to it upon the ground that I construe these terms of settlement, where the phrase "Judge's order if necessary" is used, to mean, not that, if necessary, the parties
A may apply in the action for some order to enforce the terms, but that one of the terms is that a judgment shall be taken, if necessary, for part of the sum claimed in the action. If that necessity arises, the parties will concur in, or will not oppose, the necessary order being made by the judge. That, as it seems to me, is the effect of the terms, and,
B when the judge added the words "Liberty to apply," that was only the court authorising what had happened—namely, that the action should not be finally determined upon the day on which it came in the judge's paper, on Dec. 11, 1939. The court, however, acquiesced in the action remaining incompletely heard, with the view that, if necessary,
C at some moment it should be completely tried by giving the judgment which would then be found to be the right judgment to give, having regard to the arrangement into which the parties had entered. That is shown to be the view of the present transaction adopted by the court. When one turns to the judgment, one finds that it is quite properly
D framed in this way:

> This action having on Dec. 11, 1939, and Feb. 22, 1940, been tried before TUCKER, J., without a jury, in the county of Middlesex, and TUCKER, J., on Feb. 22, 1940, having ordered that judgment be entered for the plaintiff for £1,149 11*s.* 2*d.* with costs of this day's application; it is this day adjudged that the plaintiff recover from the defendant £1,149 11*s.* 2*d.* and costs of the application of Feb. 22, 1940, to be taxed.

E

The truth is that this method of procedure for the settlement of an action (which is very common) is, technically, this. The judge is asked not to try the action for the present, but to leave it in such a position that such a judgment as is proper, having regard to the arrangement
F between the parties, may be given at some future date if it becomes necessary, and that the trial should then be complete. A little confusion is sometimes imported into a case of this kind by the fact that there is quite a different method of settling an action which is not uncommon in the Chancery Division, although it would be very difficult,
G I imagine, to adapt it to the normal procedure of the King's Bench Division. In the Chancery Division, it is not uncommon to say to the judge when the action is coming on: "We have settled this action. Will you please stay all proceedings and put an end to the action, but with the limitation that it is the desire of all parties that, if a question
H arises on the construction or the working out or the enforcement of the terms of settlement, it should be dealt with as though the action were for that purpose still alive." The object thus to be attained is effected by an order staying proceedings on the terms of the settlement—and they are usually scheduled to the order—with liberty to apply to the judge. It is not liberty to apply to the judge to give judgment in

the action, but liberty to apply to the judge to make such order as, having regard to the terms of the settlement, the parties consensually agree should be made in order to enforce their intentions.

For these reasons, in my judgment, the judge came to a wrong conclusion. It is to be borne in mind, however, that there may still be a question which was not dealt with by the judge. It was not necessary for him to deal with it in the view which he took of the legal matter, but the question is whether the terms which the master has imposed are the right terms, or whether they ought to be modified. Accordingly, the order which this court will make will be this. The appeal will be allowed with costs. The order of the judge will be discharged, and the appeal to him from the master will be referred back to the judge in chambers, in order that he may deal with it having regard to the decision of this court. Then that will leave it to the judge to say, as the plaintiff, I understand, wishes to ask the judge to say, that the terms which the master imposed are not the terms which ought to be imposed.

Luxmoore, L.J.: I agree entirely with the judgment which has just been delivered by Clauson, L.J., and do not desire to add anything to it.

Appeal allowed with costs.

Solicitors: *J. Howard Smith & Skelt* (for the appellant); *Harris, Chetham & Cohen* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Considered. Dunn *v.* Dunn. [1948] 2 All E.R. 822.

MANSEY *v.* MANSEY.

[Probate, Divorce and Admiralty Division (Henn Collins, J.), **April 4, 5, 9, 1940.**]

Divorce—Desertion—Both spouses alleging desertion—Husband's right to choose locus of matrimonial home—Reasonable accommodation offered—Wife on refusal becomes deserting spouse.

A husband petitioned for divorce on the ground of his wife's desertion, and the wife by her answer denied desertion and alleged that the husband had deserted her, the date of the alleged desertion in each case being Nov. 28, 1934. After an uneasy married life over a period of years, and after an interval of separation, the parties came together again in Jan., 1934. From then until the following Nov. the parties lived together, but during that time the wife mismanaged the household, and refused to cook for her husband, so that he was finally driven in Nov., 1934, to selling the furniture, and to moving to a boarding-house kept by Mrs. S. From then onwards he made repeated offers to his wife to induce her to live with him at this boarding-house, but she refused to do so on the ground that she did not like the locality, and that she had taken a dislike—which at the trial she admitted to be unreasonable—to Mrs. S. It was common ground that the accommodation in itself was perfectly suitable:—

Held: (i) assuming the husband to have been guilty of desertion, he had put an end to it by his subsequent offers of alternative accommodation, which were made in good faith. The wife was bound to accept the accommodation offered, and had, by her refusal, been guilty of desertion.

(ii) on the facts, the husband had not been guilty of desertion, and was entitled to a decree *nisi.*

[**EDITORIAL NOTE.** In this case, the right of the husband to choose the place where the matrimonial home shall be is affirmed. In making such a choice, the husband must not act unreasonably, but, subject to this, the refusal of the wife to live with him in the home chosen by him will be desertion on her part.

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-658, paras. 963-967; and FOR CASES, see DIGEST, Vol. 27, pp. 307-316, Nos. 2840-2939.]

HUSBAND'S DEFENDED PETITION for dissolution of marriage on the ground of his wife's desertion. There was a cross-prayer by the wife for a decree of judicial separation on the ground of desertion and for the custody of the children. The facts are fully set out in the judgment.

Allister Hamilton for the petitioner.

W. T. Fielding for the respondent.

HENN COLLINS, J.: This is a petition by Arthur Mansey for the dissolution of his marriage on the ground of his wife's desertion. The wife by her answer denies that desertion, and asserts that it was the husband who deserted her. She states that the desertion commenced on Nov. 28, 1934, that being the date which the petitioner also alleges as the date of the desertion by the wife. The wife by her answer has a cross-prayer for judicial separation on the ground of that alleged desertion, and a prayer for the custody of the children. That brings into prominence the date of Nov. 28, 1934, and, though it is not the logical sequence of events, I deal with the wife's answer first. For the moment, I assume that on Nov. 28, 1934, the husband deserted the wife. If that were the position, it is necessary to see whether after that event he has made a *bona fide* offer to resume cohabitation in circumstances in which his wife ought to have accepted it. One cannot look at the correspondence which passed between him and his wife and between their respective solicitors from and after the end of November without seeing that he was making repeated offers to his wife to induce her to live with him. The only question I have to ask myself on that is whether those offers were made in good faith, and whether they were such as the wife ought to have accepted, or whether they were put forward merely for the purpose of inviting a refusal from the wife, being themselves such as she ought not to be expected to accept as wholly lacking in sincerity. I do not think that there is any sufficient colour for the suggestion that the husband was not acting in good faith. He offers, as he had offered before Nov. 28, accommodation at a boarding-house kept by Mrs. Smith. It is common ground that that accommodation was in itself perfectly suitable, and, indeed, I think it is common ground that it was exceptionally good of its class. The reason which the wife gave for not going there was that she had taken a quite unreasonable dislike to Mrs. Smith, a dislike for which she could assign no reason and which she herself admitted to have been unreasonable.

She seems to have taken up the position that she was entitled to dictate to her husband where he should live. The rights of a husband as they used to be have been considerably circumscribed in favour of the wife, without very much, if any, curtailment of his obligations, but we have not yet got to the point where the wife can decide where the matrimonial home is to be, and, if the husband says he wants to live in such-and-such a place, then, assuming always that he is not doing that to spite his wife, and that the accommodation is of a kind which one would expect a man in his position to occupy, the wife is under the painful necessity of sharing that home with him. If she will not, she is committing a matrimonial offence. She is deserting him.

Even if the husband had deserted the wife on Nov. 28, I am perfectly satisfied that he was making these offers in good faith, and, as I shall point out in a moment, was for good reason offering accommodation elsewhere which he was prepared to occupy had his wife come to him there. In those circumstances, if there had been desertion on Nov. 28 by the husband, he had put an end to it by his subsequent offers of alternative accommodation, all of which the wife refused, first on one ground and then, as that was met, enlarging the ambit of her objection until it covered the whole of Waterloo, and, I think, eventually, even a larger district. However that may be, she did not accept what, in my view, she was bound to accept—namely, the accommodation which her husband was offering, or, if one prefers the phrase, dictating, as he was entitled to do.

That, of course, disposes of the wife's cross-answer, even on the assumption most favourable to her, that it was her husband who deserted her on Nov. 28. But did he? He sent away the furniture from the house on that date, and in that sense broke up the home. If, in so doing, he had turned his wife into the street without making any provision for her, I can well understand the court holding that to be desertion, but that is not the impression left on my mind at all as to what happened on that date. After a very uneasy married life over a period, and after an interval of separation, the parties came together again in Jan., 1934, and they lived an uneasy sort of existence between then and November. I find it scarcely surprising that their relations were uneasy, for as long ago as Apr., 1928, the wife first thought of getting a separation from her husband, and was always of that mind, with the important proviso from her point of view that she should have a measure of control over the children, access to them, and, I think, above all, provision made for herself. That desire for a separation expressed itself in a succession of futile applications to justices on one alleged complaint or another, all of which failed, and in Jan., 1934, the wife settled down, with what grace she could gather, to live the married life. The husband says that during that period she was refusing to cook for him, and not applying his money to the proper maintenance of the household, and that he was driven, if he was to live with her

ashore, to taking the household management out of her hands, and therefore driven to living in a boarding-house. It was that consideration, he tells me, which impelled him to seek lodgings at Mrs. Smith's. I accept that account of the circumstances which drove him from Brook Road West, and I do so the more because it clearly is not an afterthought
A invented for the purpose of this case, because, when I asked the wife whether he was making those complaints of her at the time, she acknowledged that it was so. She says that the complaints were unfounded, but the fact that they were made at the time is strong, in my view, to bear out, first of all, that they are not the invention of the moment
B for the purpose of answering questions in the witness-box, and, secondly, that they are true, the latter more particularly because the wife says: "I was not getting enough money to feed him as he wanted to be fed." Thus, we have the fact common between the two parties that he was not being properly fed. I accept, as I say, the husband's version of
C that, which gives a perfectly good reason for his leaving Brook Road West. I do not want it to be thought, however, that I am saying that the husband was not, in his discretion, entitled to leave Brook Road West and live in a boarding-house without entitling his wife to say: "I am not going there." Very far from that, he would have
D been entitled to do so, assuming always, as I have said, that the accommodation was perfectly suitable to the wife's station of life.

In those circumstances, I am perfectly certain that the desertion was not by the husband, and that entitles him—subject only to the fact that he has to ask for the discretion of the court before he can get his
E decree—to a decree in his favour. [His Lordship then exercised his discretion in the husband's favour.]

Decree nisi granted.

Solicitors: *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the petitioner); *Stocken, May, Sykes*
F *& Dearman*, agents for *Wright, Becket & Pennington*, Liverpool (for the respondent).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

G

STEWART *v.* HANCOCK.

[PRIVY COUNCIL (Viscount Caldecote, L.C., Viscount Sankey, Lord Thankerton, Lord Russell of Killowen and Lord Roche), **March 4, 5, April 5, 1940.**]

H *Privy Council—New Zealand—Negligence—Highways—Motor cyclist colliding with unlighted stationary car.*

Privy Council—New Zealand—Evidence—Admissibility—Running-down action —Admission of liability made by passenger in car not in hearing of driver— Whether any miscarriage of justice.

The appellant, while riding his motor cycle along a main highway on the night of Dec. 8, 1935, came into collision with an unlighted stationary motor car owned by the respondent. This car was standing at the side of the road facing in the same direction as that in which the appellant was travelling, while on the opposite side and some 30 yds. beyond was another stationary car facing in the opposite direction and showing lights. This car had stopped in response to a signal from the respondent. The appellant reduced his speed from about 35 m.p.h. to about 25 m.p.h. when approaching this latter car, and after passing out of the beams of its headlights, saw the respondent's car, braked and swerved, but came into collision with the near-side rear mudguard A and sustained injuries in respect of which he brought action against the respondent. At the trial counsel for the appellant led evidence as to an admission made by a passenger in the respondent's car, who, being asked by the appellant "Where are your lights?" said: "This is our fault entirely and we will take care of everything." This remark was made out of the respondent's hearing, and it was therefore contended B that the evidence on this point had been wrongly admitted. The evidence had been led and admitted on the assumption that it could be proved that the remark was heard by the respondent:—

HELD: (i) there was proper and ample evidence before the jury that the appellant, whilst dealing with a situation of some difficulty, created by the respondent himself, and whilst keeping a proper lookout, properly attended for a sufficient time to an element of possible danger—namely, C the other car—to account for the fact that he did not see the respondent's unlighted car in time to avert the consequences of its naturally unexpected presence. It cannot be said that, where there is an unlighted obstruction in the roadway, a careful driver is bound to see it in time to avoid it and must, therefore, be guilty of negligence if he runs into it.

(ii) there had been no admission of the evidence complained of. D There had been a sufficient direction, when the evidence was conditionally taken, subject to proof of other matters, that, unless those conditions were fulfilled, it was not evidence in the case, and, in any event, there had been no substantial wrong or miscarriage of justice.

[**EDITORIAL NOTE.** There is little difficulty in stating the principles applicable to negligence, and, indeed, those applicable to the present case might be said to E have been settled since the decision in *Davies* v. *Mann* (1842), 10 M. & W. 546; 36 Digest 113, *751*. It is the change in the nature of the vehicles used on the highway that has made their application difficult. In the case of a collision with an unlighted vehicle, it has been said that the driver is in the dilemma that he was either not keeping a sufficient look out, or, if he was keeping a sufficient look out, he was driving too fast to avoid the accident, but, in reported cases at least, the driver F has succeeded as often as not in escaping from that dilemma and has been successful in the action.

AS TO COLLISIONS WITH UNLIGHTED VEHICLES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 639, 640, para. 899; and FOR CASES, see DIGEST, Supp., Negligence, Nos. 389a-389f.]

Case referred to: G

(1) *Tidy* v. *Battman*, [1934] 1 K.B. 319; Digest Supp.; 103 L.J.K.B. 158; 150 L.T. 90.

APPEAL by the plaintiff from an order of the Court of Appeal of New Zealand (OSTLER, SMITH and JOHNSTON, JJ., SMITH, J., dissenting) reversing a judgment of FAIR, J., in an action for damages. H The facts are fully set out in the judgment of their Lordships delivered by LORD ROCHE.

F. A. Sellers, K.C., and *H. G. Rowley* (for Alexander Ross on war service) for the appellant.

Gilbert H. Beyfus, K.C., and *Humfrey H. Edmunds* for the respondent.

Lord Roche: This is an appeal *in forma pauperis* by the appellant, the plaintiff in the action, from a judgment of the Court of Appeal of New Zealand whereby it was ordered that the action be remitted to the Supreme Court at Auckland for judgment to be entered for the respondent, the defendant in the action, with costs.

The circumstances giving rise to this appeal were as follow. The appellant, just after midnight on Dec. 8, 1935, was proceeding on his motor cycle along a main road leading from Hamilton to Auckland, and was riding on his proper side in the direction of Auckland. At this time, the defendant's motor car had come to a standstill on the same side of the road, facing in the same direction—that is to say, towards Auckland—showing no rear or other light. The lights had been switched off by the respondent whilst the car was stopped. At the same time, there was another motor-car stationary in the roadway and showing lights. This car, whilst proceeding from Auckland towards Hamilton, had been hailed to stop by the defendant when his own car was stopped, and the driver of this other car, one Singer, complied with the request so made and brought his car to rest on his side of the road some 30 yds., or thereabouts, past the defendant's car and on the opposite side of the road. In this situation, the appellant on his motor cycle approached and passed by Singer's car, reducing his speed from about 35 m.p.h. to about 25 m.p.h., and, when he had passed out of the beams of its lights, saw the loom of the respondent's car, braked and swerved, but came into collision with the near-side rear mudguard of the car, and sustained injuries.

The action was brought to recover damages for such injuries, and was tried before Fair, J., and a jury on July 30, 31, 1936. Evidence was called on the part of the appellant, the plaintiff in the action, and, when his case was closed, counsel for the respondent asked for a nonsuit, on the ground that, upon the evidence thus called, and upon the undisputed facts of the case, the appellant was guilty of contributory negligence in (i) failing to keep a proper look out, (ii) proceeding as he did when dazzled by the lights of another (Singer's) car, and (iii) proceeding at such a pace as would not enable him to stop in time to avoid anything which might have been on the road. There was no argument upon this submission at the trial, but the point was reserved until after verdict for further consideration and argument. The respondent's counsel then addressed the jury and called evidence. The respondent's explanation of his lights being off was that he switched them off in order to spare his battery whilst he was trying to re-start his car by means of the starting handle, and that he forgot to switch them on again. The negligence of the respondent was not admitted on the pleadings, and was in issue at the trial.

The judge directed the jury that, if they found that the plaintiff had the last opportunity of avoiding the accident and negligently failed to avail himself of it, or that he was negligent in any of the respects alleged and such negligence was a proximate cause of the accident, there should be a verdict for the defendant. He also told the jury that, if they found that negligence of the defendant was the sole proximate cause of the accident, there should be a verdict for the plaintiff. It was not suggested that these directions were not correct in law, or were open to any objection on the part of the respondent. The jury returned a verdict for the appellant for damages amounting to £1,259 8*s.* 2*d.* Judgment was A entered in accordance with the verdict, leave being reserved to move to set aside the judgment.

Pursuant to such leave, the court was moved to set aside the judgment, and was asked either to enter judgment for the defendant, or for a non-suit on the grounds submitted at the close of the plaintiff's case at B the trial, or to order a new trial on the grounds that the damages were excessive and that certain evidence given for the appellant had been wrongly admitted. On Oct. 13, 1936, the judge gave a considered judgment dismissing the motion. As to the question of non-suit, he held that, on the facts, it was impossible to say that, as a matter of C law, the appellant was guilty of contributory negligence, and that there was evidence fit for consideration by the jury as the judge of fact upon which they could reasonably find that negligence in the appellant was not established. On the question of the suggested wrongful admission of evidence—a matter which will be discussed in more detail D later in this judgment—the judge held that there was no wrongful admission of evidence, and in any case there was no miscarriage of justice. The question of amount was dealt with and the verdict and judgment upheld, and this matter was not raised upon appeal in New Zealand or before their Lordships. E

The respondent appealed to the Court of Appeal of New Zealand, and the appeal was heard by OSTLER, SMITH and JOHNSTON, JJ. The appeal was allowed, the court by a majority (SMITH, J., dissenting) holding that judgment should have been entered for the respondent, on the ground that it was conclusively proved that the proximate cause of the F accident was the appellant's own negligence and that the verdict of the jury was so unreasonable as to be perverse. SMITH, J., took the contrary view on this point, and agreed with the trial judge, but held that evidence had been wrongly admitted and that a new trial should be had. It was not necessary that the judges in the majority should express an opinion G on this latter point, and they did not in fact do so. With this conflict of judicial opinion, the appeal came before their Lordships, and was carefully and elaborately argued. On the main point, their Lordships are of opinion that the correct view and conclusion was that expressed by the trial judge and in the dissenting judgment of SMITH, J., in the H Court of Appeal, and they approve of the reasoning of those judges.

Numerous cases were cited in the Court of Appeal and before their Lordships, including cases of collisions by motor vehicles with stationary unlighted objects. Their Lordships are of opinion that no useful purpose would be served by a further discussion of those cases, and still less by a consideration of the question of whether any particular one of them was rightly decided on the facts. They agree with the summary of their legal effect presented by Ostler, J., who, in dealing with *Tidy* v. *Battman* (1), a judgment of Macnaghten, J., approved by the Court of Appeal, read the following passage from the judgment of Macnaghten, J., at pp. 320, 321 :

> At night time the visibility of an unlighted obstruction to a person driving a lighted vehicle along the road must necessarily depend on a variety of facts, such as the colour of the obstruction, the background against which it stands, and the light coming from other sources . . . It cannot, I think, be said that where there is an unlighted obstruction in the roadway, a careful driver of a motor vehicle is bound to see it in time to avoid it, and must therefore be guilty of negligence if he runs into it.

Then Ostler, J., proceeded as follows :

> With that passage I respectfully agree. It might be paraphrased and shortened into a statement that negligence is a question of fact, not of law : that each case must depend upon its own facts : and that there is no rule of law which in every case disqualifies a motorist from recovering damages where he has run into a stationary unlighted object.

Agreeing as they do with this admirable summary of the law applicable to this case, their Lordships pass to an examination of the facts of this case in more detail, and to their reasons for differing from the conclusion of Ostler and Johnston, JJ., that there were no facts in the present case fit for consideration by a jury, or of any value so as to justify a verdict for the appellant.

The facts, and in particular those as to weather conditions, are compendiously and correctly summarised in the judgment of Smith, J., as follows :

> Were, then, the circumstances such that reasonable men might not find that the respondent was not guilty of negligence ? The jury had before them the following facts that the appellant's unlit and stationary car occupied 4 ft. 6 ins. of a bitumen road 20 ft. wide. The car was dark in colour. It was not disputed that the bitumen road was of the same colour, and, indeed, that is common knowledge. There was thus no contrast between the car and the road. There is no exact evidence as to the atmospheric conditions at the place and time of the accident, but there is evidence from which the jury might infer that the conditions of visibility were then and there such that it was not easy for a motorist proceeding normally with good lights to pick up this unlighted obstruction. There is divergent evidence about the state of the moon, whether it was obscured by clouds or not, whether the night was clear or dark. There is evidence from which the jury could conclude that about midnight, when the accident took place, the moon was five-sixths of its way across the sky. There is also evidence of fog at some distance from the scene of the accident, which might indicate to the jury an excess of moisture in the atmosphere. In my opinion, the jury might think that, at the scene of the accident, vision was difficult. For example, after William Arthur Singer's car had passed the appellant's car and had drawn up at a distance of say, 90 ft. from the appellant's car, Singer said that, when he looked back, he could not see the appellant's car from where he was. Furthermore, the jury might think that conditions existed at or about the scene of the accident in which the lights of a motor car or motor cycle were partially absorbed by the bitumen surface. This inference is supported, I think, by the evidence of the occupants of Singer's car, which approached the appellant's stationary car from the direction of Auckland . . . In my opinion, then, the jury were entitled to think that the conditions of visibility were difficult and peculiar when Singer's car approached the appellant's car from the north. They were, I think, entitled to conclude that a similar difficulty existed when the respondent's motor cycle approached from the south, and to think that the difficulty was greater because the respondent had then to contend

> with the headlights of Singer's car, which had its front wheels turned slightly at an angle, ready to go back on the road, and, as a consequence, had its headlamps showing at a slight angle across the road.

Some suggestion was made in argument that the appellant must have had a light less powerful than was required by the regulations in force, but it became manifest that no such case could be made, and that the real point was whether or not the appellant was keeping a proper look out. As was pointed out by Smith, J., no allegation complaining of the appellant's light was made in the pleadings, and the point was abandoned below. The appellant gave evidence as to his look out and observation of the road. The salient features of the evidence were that the appellant on approaching the two cars in question, justifiably concluded that the only car on the road was Singer's car, and that, but for it, the road was clear. As to other objects, such as possible foot-passengers, it is to be observed that the road was a country road, and the time after midnight. In such circumstances, the appellant said that he reduced his speed and approached Singer's car, and, when he appreciated that it was stationary, directed his attention to that car, and that, though he was not dazzled by the lights of Singer's car, which were dipped, there was a slight blinding effect from them. He spoke to the facts already mentioned in this judgment, as to the colouration of the road and of the respondent's car, and as to the distance at which he picked it up, and the action he took to avert a collision. Their Lordships agree with the opinion of Smith, J., thus expressed:

> In my opinion, the jury might infer from this evidence, not only that the respondent glanced towards Singer's car because he thought he had had engine trouble, but also that the respondent would look towards Singer's car after slowing down because he thought people might step out from behind Singer's car, and that he did so look after passing Singer's car, because, when he "looked back," the unlighted car was looming ahead about 20 ft. to 30 ft. away. The lights of Singer's car had a slight blinding effect at the moment of passing, but the jury might infer, I think, that, during the operation of the blinding effect, the respondent would have covered some part of the distance between Singer's car and the appellant's. In these circumstances, and those affecting the illumination of the road, the jury might conclude, reasonably, I think, that the respondent was exposed to a special hazard, in the first place, in meeting at night on a main highway in the country a stationary car (*a*) with lights showing across the road and causing a slight blindness as he passed it, (*b*) in such circumstances that it properly required some attention after the cyclist had recovered his sight, and (*c*) in such circumstances that he was induced to move further over to his left, and, in the second place, in being thus brought more into direct line with an unlit stationary car only 90 ft. away from Singer's car, which was not shown up by the light of his cycle before his attention was engaged by Singer's car, and which, as the jury might think, was only 20 ft. to 30 ft. away from respondent when he again looked ahead after looking to the rear of Singer's car to see if people might step out there.

The question, it need hardly be said, is not whether their Lordships would have arrived at the same conclusion as that at which the jury arrived after seeing and hearing the witnesses, but whether the jury arrived at an unreasonable conclusion, or one unsupported by evidence fit for their consideration. As to this, their Lordships hold a clear opinion that there was proper and ample evidence before the jury that the appellant, whilst dealing with a situation of some difficulty, created by the respondent himself, and whilst keeping a good look out, properly attended for a sufficient time to an element of possible danger—namely, Singer's car—to account for the fact that he did not see the respondent's unlit car quite in time to avert the consequences of its naturally unexpected presence. With regard to the appellant's speed, it was contended that this was excessive, and that he should have stopped if he could not see. This was a consideration which no doubt was urged by counsel in addressing the jury, and was no doubt considered by the jury, but, having regard in particular to the fact that, so far as all appearances and observation could show, there was no car but Singer's car to be considered, it seems to their Lordships to be impossible to hold that the jury was bound to find negligence in this regard. For these reasons, their Lordships hold that the Court of Appeal was wrong in directing that judgment should be entered for the respondent.

There remains to be considered the other question of the alleged wrongful admission of evidence as affording ground for an order for a new trial. The facts and the ruling of the trial judge are thus stated in his judgment upon further consideration:

> The next ground upon which a new trial was sought was that counsel for the plaintiff led evidence early in the hearing as to an admission made by Miss Vincent, a passenger in the defendant's car, after the collision as to the defendant's responsibility as follows: "Was anything said by you to the people there?—I said to a young lady present: 'Where are your lights?'
>
> "Was anything said in reply to that?—She said: 'This is our fault entirely and we will take care of everything.' [Mr. Towle objects.]"
>
> Counsel for the plaintiff, when this evidence was led, assumed that he could prove that the defendant was within hearing when the admission was made, and stated that he had two witnesses who could depose to this fact. I ruled that its admissibility was dependent on its being shown to have been made in his hearing. It subsequently appeared, however, that this could not be shown. There was no evidence that Miss Vincent had authority to make such an admission. She herself denied having made it.
>
> In order that this may be a ground for a new trial, it should appear that some substantial wrong or miscarriage of justice was occasioned to the defendant by this evidence: Code of Civil Procedure, r. 277. I do not think that this can be said. The negligence of the defendant is not now seriously contested. The only questions requiring detailed consideration by the jury were those as to the contributory negligence of the plaintiff. In some circumstances, the evidence complained of might have had a material effect upon the view taken by the jury of the facts, but, in the present case, the jury was well aware, from the evidence, the conduct of the case, the addresses of counsel, and the summing up, that the real question was as to the plaintiff's contributory negligence. The members of the jury would also be aware that the opinion of Miss Vincent (if it had been given as deposed to by the plaintiff) was entitled to little or no weight on that question, and that it must be determined on the facts presented in evidence before it.
>
> Moreover, although this evidence was heard by the jury, it was ruled to be inadmissible upon the facts as they emerged. Counsel might have dealt with this matter in his address or asked that it be dealt with in the summing up. Possibly it was thought that a reference to its inadmissibility might lead to its being brought prominently before the jury, and neither course was followed. In these circumstances, I do not think it can now be said that the evidence was improperly admitted or that any substantial wrong or miscarriage was caused.

On these facts, their Lordships in this respect find themselves in agreement with the trial judge and in disagreement with the contrary opinion expressed by Smith, J., in the Court of Appeal, and are of opinion that there was no admission of the evidence complained of, that, when it was conditionally taken, subject to proof of other matters, there was a sufficient direction that, unless those conditions were fulfilled, it was not evidence in the case, and that, having regard to the course of the trial, the trial judge was not wrong, and was probably wise, in not again reminding the jury of matters which counsel in their concluding speeches had thought it right to ignore. In any event, their Lordships are of opinion that no substantial wrong or miscarriage of justice can, in these circumstances, be said to have occurred.

Their Lordships will accordingly advise His Majesty that the appeal should be allowed, with such costs as are proper in the case of an appeal to His Majesty in Council *in formâ pauperis*, and that the judgment for the appellant for the sum of £1,259 8*s.* 2*d.* and costs should be restored, and that the appellant should have the costs of the appeal to the Court of Appeal.

Appeal allowed with costs.

Solicitors: *Wray, Smith & Halford* (for the appellant); *Wedlake, Letts & Birds* (for the respondent).

[*Reported by* Charles Shelley, Esq., *Barrister-at-Law.*]

PEMBERY *v.* LAMDIN.

[Court of Appeal (Slesser, Clauson and Luxmoore, L.JJ.), **April 10, 1940.**]

Landlord and Tenant—Repairs—Landlord's covenant to keep external walls in tenantable repair—Old house—Dampness—"External wall."

A lessor demised certain old premises not constructed with a damp course or with waterproofing for the outside walls, and covenanted to keep the external part of the demised premises other than the shop front in good and tenantable repair and condition. The tenant claimed that, under the covenant, the landlord was liable to waterproof the outside walls, and so render the place dry:—

Held: (i) the obligation on the landlord was only to keep the premises in repair in the condition in which they were when demised, and, as they were old premises, he was not liable to do any more than point the brickwork.

(ii) an external wall is one forming part of the enclosure of the premises, and is not necessarily exposed to the atmosphere, but may adjoin another building.

[**EDITORIAL NOTE.** The extent of repair necessary to comply with the covenant in the usual form has always been defined in general terms. In the case of old houses, a very common defect is dampness, and this is a matter which the local sanitary authorities often ask to have remedied. This decision defines the landlord's liability under the usual covenant in respect of external walls, and Luxmoore, L.J., has confirmed a longstanding definition of the external wall.

As to Extent of Landlord's Covenant to Repair, see HALSBURY, Hailsham Edn., Vol. 20, pp. 201, 202, para. 219; and for Cases, see DIGEST, Vol. 31, pp. 314-319, Nos. 4561-4608.]

Cases referred to:

(1) *Lister* v. *Lane & Nesham*, [1893] 2 Q.B. 212; 31 Digest 328, *4700*; 62 L.J.Q.B. 583; 69 L.T. 176.

(2) *Lurcott* v. *Wakely & Wheeler,* [1911] 1 K.B. 905; 31 Digest 332, *4757*; 80 L.J.K.B. 713; 104 L.T. 290.

(3) *Hewitt* v. *Rowlands* (1924), 93 L.J.K.B. 1080; 31 Digest 319, *4607*; 131 L.T. 757.

(4) *Green* v. *Eales* (1841), 2 Q.B. 225; 31 Digest 318, *4599*; 11 L.J.Q.B. 63.

A APPEAL by the plaintiff from a judgment of His Honour DEPUTY-JUDGE STURGES, K.C., delivered at Marylebone County Court on Mar. 7, 1940. The facts are fully set out in the judgment of SLESSER, L.J. The deputy-judge found that, to cure dampness mainly due to the old porous bricks and mortar, the wall would have had to be practically B renewed, at a cost, with certain other necessary repairs, of £202. On the law, he held, following FLETCHER MOULTON, L.J., in *Lurcott* v. *Wakely & Wheeler* (2), that the lessor was bound to keep the external part of the demised premises in good and tenantable repair and condition, even if to do so it should be necessary to make part of the C premises in a better condition than that in which they were when they were originally demised. He gave judgment on the counterclaim for £175, that sum to exclude damage for the loss of use of the basement. The plaintiff appealed, on the grounds that the deputy-judge was wrong in law in holding (i) that the plaintiff was liable to repair the basement D by renewing the walls, or to put or keep it in such a condition that it could be used as a cocktail bar; (ii) that the covenant to repair was not to be construed with reference to the condition of the premises at the beginning of the lease; (iii) that there was evidence before him on which he could find a breach of the landlord's covenant; (iv) that the measure E of the damages for any breach was the cost of carrying out the repairs required to remedy such breach, and on the ground that there was no evidence that the plaintiff had suffered any damage by any breach of the covenant, and that the sum awarded as damages was excessive.

Serjeant Sullivan, K.C., and *T. Dawson* for the appellant.

F *W. Arthian Davies* for the respondent.

SLESSER, L.J.: In this case, Alfred Charles Pembery, the landlord, sued Florence Maud Lamdin, the defendant, for 1½ quarters' rent of premises known as 62, Blandford Street. That was rent owing under G a lease made between the parties and dated Aug. 2, 1939. As regards that rent, final judgment for £56 5*s*. and £10 11*s*. 6*d*. was signed before MASTER SIMNER, but it was ordered that execution be stayed pending the trial of the counterclaim, if the counterclaim be set down in 14 days. Then followed certain conditions as to costs. The counterclaim was duly H set down, but was not formulated by way of pleading. The defendant relied by way of counterclaim, as she was entitled to do, upon an affidavit which she swore on Dec. 20, 1939, in which she states in para. 2 as follows:

> On Aug. 2, 1939, I entered into a lease with the plaintiff of the shop and premises on the ground floor, together with the basement situate and known as 62, Blandford Street, in the parish of St. Marylebone. The term was for 16 years 4 months

and 10 days, to commence from Aug. 10, 1939. The rent payable was £150 for the first year and thereafter £250 per annum.

Then in para. 3 she states as follows:

> By a covenant in the said lease the plaintiff agreed that he would keep the external part of the demised premises (other than the shop front) in good and tenantable repair and condition. A

Then in paras. 4 and 5 she states as follows:

> (4) I opened a wine bar on the ground-floor premises, and it was my intention, as the plaintiff well knew, to open a cocktail bar in the basement of the premises. I accordingly opened the bar on the ground floor and was making arrangements to have the necessary parts of the basement converted when I was informed that this would be impossible owing to the state of the basement, as the result of rain-water B penetrating the premises owing to the fact that the outside walls were in a bad state of repair. (5) I accordingly called in a surveyor, who reported on the premises to me on Oct. 19, 1939.

In that report of the surveyor, Mr. Bowden, which is exhibited to the defendant's affidavit, he states that, having inspected the basement of the property, he found: C

> . . . that the worst portions of the basement are at the front and rear. In the front, water is percolating through the defective pavement lights, and travelling along the steel joists supporting them and wetting the brickwork, but, in addition to this, I am of the opinion that, owing to the age of the brickwork, and, probably, that no steps were taken to waterproof it externally at the time it was built, water is penetrating into the brickwork from the earth under the paving-stones, both on D the front and side roads. At the back of the premises, in the room which you had commenced to alter for the purpose of using as a cocktail lounge, the walls here are absolutely saturated with water, and again I feel that is due to the age of the brickwork and the probability that it was not waterproofed externally at the time they were built.

Then he goes on to discuss how much it would cost to put this matter E right. He gives the opinion that the work would have to be done internally:

> . . . owing to the fact that the rear wall abuts against the store at the rear of the fire station, and it would not be possible to get down the outside of your basement wall without taking up the floor of the store at the rear of the fire station. . . .

Then he says: F

> To successfully waterproof this room would, in my opinion, necessitate removing all the panelling and battening from the walls, cleaning them down, raking out the brickwork, asphalting the walls, and building a 4½ ins. wall inside to keep the asphalt in position, and laying new concrete floor about 4 ins. thick to prevent water coming under the walls, as it does at present, and trickling across the existing floor. With regard to the dampness along the flank wall of the house, G that is the corridor and side of the staircase, in my opinion the cause is the same, penetration of water from the earth under the pavement, and in addition there is a patch of broken defective rendering to the cement plinth along the side of the house. Here it would be possible for the wall to be waterproofed externally.

That being the substitute for the pleading, in those circumstances the case came on for hearing before the county court judge. Certain facts H in this case are really not in dispute. First, it is not in dispute that this lady, a vintner, took these premises, the ground-floor and the basement, for the purpose of providing accommodation for the public for drinking cocktails and wines. She agreed with the landlord that, in consideration of her doing certain necessary physical repairs to fit the

premises for her new business, she should pay £150 instead of £250, which was to be the rent in succeeding years. Secondly, it is common ground that the way in which those premises are built is such that the greater part of the basement is underground. The road which adjoins it, Blandford Street, slopes downwards, and, whereas one portion of the
A basement is completely underground, the other end is very near to the surface. The walls which are said to be in this damp state are walls which for the most part are in immediate contact with the damp earth, and always have been in contact with it. It is an old house, 100 years or more in age, and it was built at a time when modern devices for avoiding
B the consequences of damp were unknown. As the surveyor points out in his report, there was no provision for waterproofing it. When one comes to construe the repairing covenant, and looks (as directed by the authorities) to the nature of the premises demised, it is clear from the evidence, the judgment, and the surveyor's report that this was a house
C of the old type, with a cellar for the most part built into the ground, without any precautions against damp oozing through the porous bricks into the cellar. The house above fortunately may have remained dry, but that was the kind of house which was demised.

The repairing covenant on which the defendant sought to recover a
D considerable sum by way of damages is as follows:

> The lessor hereby covenants with the lessee as follows that is to say that the lessor will keep the external part of the demised premises in good and tenantable repair and condition. . . .

The first question which arises in this case is what was the nature of
E the obligation to repair. In order to ascertain that, it is first necessary to consider the nature of the premises which had to be repaired under the covenant. I think that, for the purposes of this case, the principle, which has never been doubted, is to be found stated in a short passage in a judgment of LORD ESHER, M.R., in *Lister* v. *Lane & Nesham* (1).
F That is a case which has been subsequently followed and approved in *Lurcott* v. *Wakely & Wheeler* (2). In *Lister* v. *Lane & Nesham* (1), after reviewing the earlier authorities, LORD ESHER, M.R., who was speaking there of a tenant, says, at pp. 216, 217:

> Those cases seem to me to shew that, if a tenant takes a house which is of such
> G a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing . . .

Applying that to a landlord, in the same way as it is in that case applied
H to a tenant, if the counterclaim here made by Mrs. Lamdin be correct, she is entitled to receive at the hands of this landlord "a different thing" from that which she took when she entered into the covenant. She took this old house with a cellar without any waterproof protection, and she is asking the landlord so to repair that house as to give her a cellar which has a waterproof protection and is dry. That is not a

right which she can possibly maintain, because the obligation of the landlord is to repair that which is demised, and not to give her something much drier in its nature than that which was demised.

For myself, for the purposes of this case, I do not feel it necessary to go into any further authorities, but I will point out that SIR H. H. COZENS-HARDY, M.R., in *Lurcott* v. *Wakely & Wheeler* (2), says substantially the same thing, at p. 914: A

> Is what has happened of such a nature that it can fairly be said that the character of the subject-matter of the demise, or part of the demise, in question has been changed?

In the same case, FLETCHER MOULTON, L.J., says the same thing, at p. 916: B

> Now what is the meaning of keeping old premises in good condition? I can see no difficulty in deciding the meaning of that. It means that, considering that they are old premises, they must be in good condition as such premises.

If for the words "old premises" are substituted the words "not waterproofed," we have here the exact case. They have to be kept in repair in the condition of the house when it was demised, according to the character of the house. BUCKLEY, L.J., gives judgment to the same effect, approving of what was said in *Lister* v. *Lane & Nesham* (1). C

In those circumstances, it would seem that the greater amount of the damp which can be complained of in this case is due to the absence of this waterproofing, which is estimated to cost £202, according to the evidence of Mr. Bowden, the surveyor who made the report. That evidence attributes the dampness to the external brick walls being porous because of their age. It is true that he adds that the mortar, being partly perished, allowed the water to pass through. On that, it is said that, whatever the condition and nature of these walls, the landlord would be liable under his covenant to repair to render the premises dry, or, at any rate, to have the mortar pointed. The whole sum involved, says Mr. Bowden, would be £202. As I understand, the cost of pointing would be a very small portion of that. D E F

However, the defendant in her counterclaim entirely failed to produce any evidence to show, first, that, even if this repair to the mortar had been made, the damp, which, according to the surveyor, naturally exists in the house without its being waterproofed in the basement would not, in the circumstances, have been effectively less. Much less does the surveyor say that that particular increase in damp, which might conceivably be measured by a scientific instrument, would in any real sense have caused the defendant, who wished to use these rooms as a cocktail bar, any increase in the damage over and above the damage which would have resulted anyhow, even if the mortar had not been repaired. I do not think that the case was fought upon an award of nominal damages which might have flowed from the fact that the mortar had not been pointed. As the judge's judgment shows, I think, quite clearly, it was fought on the general principle that there was a general obligation G H on the landlord, under his covenant to repair, to keep this basement dry. In that, I think, as I have said, that the judge has misdirected himself, and has misunderstood the effect of what FLETCHER MOULTON, L.J., said in *Lurcott* v. *Wakely & Wheeler* (2).

The only matter left outstanding is this. In order that the landlord may be held liable, notice must be given to him requiring him to make the repairs. There was another matter of liability, which was to repair the pavement lights, which were said to be defective. It is said that, as a result of that notice, the pavement lights were repaired, but were repaired insufficiently. No further notice was given, and the claim with regard to the repair of pavement lights failed here for want of notice requiring a fresh repairing of those lights. I entirely agree with the criticism which counsel for the appellant directed to the judgment of the judge in that regard. Even if there were to be held, as I do not think there should, a general liability under the covenant, it was only subsidiary to the matter on which damages have here been assessed. The judge appears to have thought that, once it was shown that it would cost, not the whole of the £202 which was asked for, but a lesser sum of £175, all those were damages which were attributable to the breach of covenant to repair. In taking that view, he overlooked the principles which are set out in *Hewitt* v. *Rowlands* (3), where BANKES, L.J., said, at p. 1082:

> *Prima facie* the measure of damage for breach of the obligation to repair is the difference in value to the tenant during that period between the house in the condition in which it now is and the house in the condition in which it would be if the landlord on receipt of the notice had fulfilled his obligation to repair.

The judge never directed his mind to that matter. He seems to have treated the case rather as if it were one of breach of contract under the Sale of Goods Act, 1893, or something like that. At any rate, he did not apply those principles. Inasmuch as I am of opinion that there has been no failure on the part of the landlord in the performance of his covenant, it is unnecessary to consider what damages ought to have been awarded on the basis that he so failed. Having regard to the character and nature of this house, I think that there was no obligation to put it into a condition other than that in which it was when it was demised. As the evidence of the surveyor goes to show that, in the absence of waterproofing, this basement, with porous bricks, was always liable to be damp, it follows that the tenant cannot be heard to say that the landlord has failed to repair that which he gave to her in the demise, which he never undertook to put in better condition than that in which it was when she took it. To hold otherwise, as the judge has held, seems to me to be doing the very thing which was said to be wrong in this court in *Lister* v. *Lane & Nesham* (1), and to give to the tenant a different thing from that which she took when she entered into the lease. For these reasons, I think that this appeal succeeds.

CLAUSON, L.J.: I agree.

Luxmoore, L.J. : I also agree. There is only one point on which I should like to add a few words, because Slesser, L.J., has not dealt with it. I refer to the argument put forward by counsel for the appellant with regard to the construction of this particular covenant. He said that, on the true construction of this covenant, the particular wall which was in dispute between the parties was not an external wall of the premises. The covenant is that the lessor :

> . . . will keep the external part of the premises in good tenantable repair and condition. . . .

As I understand the argument, it was suggested that this could not be an external part of the premises, because there was no part of it exposed to the atmosphere, and the only part which could be reached was the face of the wall which was to be found in the interior of the premises.

This precise covenant was construed in *Green* v. *Eales* (4) as long ago as 1841. In that case, at the time of the demise, the house had another house adjoining it. The wall between that house and the adjoining house rested on the adjoining house, and could not be reached from the outside. It was said that, consequently, it was not an external part of the premises. The adjoining house was in fact pulled down, so that, at the time the case was decided, the wall was exposed to the atmosphere. Lord Denman, C.J., said, however, that, even before the adjoining house had been pulled down, the court was of opinion that the wall in question was an external part of the premises. It is quite true that it is an *obiter dictum*, but he said, at p. 237 :

> The external parts of premises are those which form the inclosure of them, and beyond which no part of them extends : and it is immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building which forms no part of the premises let.

That definition of "the external part" of premises has always been recognised as a proper and adequate definition of the term, and I think that there can be no question that, upon the true construction of this covenant, the wall in question is an external part of the premises. As I said, I agree entirely with what Slesser, L.J., has said with regard to the rest of the case, and I agree that this appeal should be allowed.

Appeal allowed with costs. Counterclaim dismissed with costs.

Solicitors : *MacDonnell & Co.* (for the appellant) ; *Whelan & Co.* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

HILLS *v.* CO-OPERATIVE WHOLESALE SOCIETY, LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), **April 15, 18, 1940.**]

Estoppel—Previous proceedings in respect of same cause of action—Proceedings under Employers' Liability Act, 1880*—Proceedings in High Court against employers for servant's negligence.*

The plaintiff brought an action in the High Court founded on the negligence of the defendants' servants. Fearing that this action would be defeated by a defence based on the doctrine of common employment, he brought proceedings under the Employers' Liability Act, 1880, in the county court. In these proceedings, the defendants paid into court with a denial of liability the whole sum which the plaintiff could recover, and the plaintiff accepted that sum in satisfaction of his claim. In the High Court action, the defendants raised the defence of common employment, and later submitted as a preliminary point of law that the acceptance of the sum paid into court in the county court proceedings debarred the plaintiff from recovering any sum in the High Court action:—

HELD: the cause of action was the same in both these proceedings, and, in the circumstances, the High Court action was barred.

[**EDITORIAL NOTE.** The object of the Employers' Liability Act, 1880, was to give the workman some relief against the operation of the doctrine of common employment. The Act only applies to a restricted class of claims, and the amount recoverable is also subject to severe restriction. It is decided, however, that the cause of action is the same in both proceedings, and recovery in one bars the prosecution of the other.

As TO *Res Judicata*, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-414, paras. 465-469; and FOR CASES, see DIGEST, Vol. 21, pp. 198-216, Nos. 434-529.]

Case referred to:

(1) *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685; 36 Digest 8, *10*; 56 L.J.Q.B. 340; 57 L.T. 537.

PRELIMINARY ISSUE OF LAW to determine a question of estoppel. The facts are fully set out in the judgment.

W. B. Frampton for the plaintiff.

C. L. Henderson for the defendants.

MACNAGHTEN, J.: In this action, which was commenced by a writ of summons dated Oct. 3, 1938, the plaintiff, Ruben Sidney Hills, is suing the defendants, the Co-operative Wholesale Society, Ltd., to recover damages for personal injuries caused by the negligence of the defendants' servant or servants at the defendants' works, Lincoln Road, Ponders End, in the county of Middlesex. By his statement of claim, the plaintiff alleged that he was a general labourer employed by the defendants at those premises, and that on Aug. 12, 1938, the plaintiff

> . . . on the instructions and under the supervision of Mr. Russell, the under-manager of the defendants, was engaged at the defendants' said premises in assisting to assemble a veneer press.

By para. 3, it is alleged as follows:

> In the course of carrying out the said work the plaintiff was required to assist in the transport of certain steel press plates of about one ton each in weight from

one part of the defendants' said premises to another, for which purpose the defendants supplied a wooden bogey truck.

Then para. 4 is as follows:

> The platform of the said bogey truck was 4 ft. in length by 2 ft. 3 ins. in breadth, the dimensions of the said steel press plates were approximately 5 ft. 6 ins. in length by 4 ft. 6 ins. in breadth. . . .

Then it is alleged that the plates were in a greasy condition. Then in para. 5 it is alleged as follows:

> On the date and at the place aforesaid the plaintiff was engaged in carrying out his said work in transporting one of the press plates when, by reason of the negligence of the defendants, the bogey truck collapsed under the weight of the said press plate, so that it fell upon and knocked down the plaintiff, whereby he sustained severe personal injuries, and suffered and incurred loss, damage and expense.

Then follow particulars of the alleged negligence.

On Dec. 14, 1938, the defendants delivered their defence. Subject to certain admissions which were made, the defence traversed the allegations contained in the statement of claim, and the defendants denied that they had been guilty of the alleged negligence, or of any negligence at all. By way of alternative defence, they set up the defence of *volenti non fit injuria.* On Feb. 14, 1939, the defendants amended their defence, pursuant to leave which had been given by Master SIMNER. They amended their defence by adding para. 6, which is as follows:

> In the further alternative, the defendants say that the accident to the plaintiff was solely caused by the negligence of the plaintiff and of his fellow-employees in common employment with him, and engaged with him in the operation of assembling a veneer press. The plaintiff and his fellow-employees were negligent in that they failed to keep the bogey truck under control, or pushed and pulled the same at too great a speed on an uneven surface.

The delivery of that defence had no doubt been anticipated by the plaintiff's advisers, and on Feb. 10 they issued a plaint on behalf of the plaintiff Hills in the Edmonton County Court, making a claim under the Employers' Liability Act, 1880, similar to that which they had made in the High Court action. The particulars of claim in those proceedings in the county court reproduced all the relevant allegations in the original statement of claim in the High Court action In the county court action, the defendants denied liability, but brought into court the sum of £468, which was the maximum amount which the plaintiff could recover in the action in the county court. The plaintiff in the county court action took that money out of court, as he was entitled to do under the rules of court, in satisfaction of his claim. Thereupon the defendants re-amended their defence, inserting in it para. 8, which reads as follows:

> By plaint No. T. 578 dated Feb. 10, 1939, issued in the Edmonton County Court, the plaintiff instituted proceedings under the Employers' Liability Act, 1880, against the defendants in respect of the matters complained of in this action. The plaintiff has recovered from the defendants in the said proceedings the sum of £468, which said sum was paid into court with a denial of liability by the defendants.

> The said sum was taken out of court by the plaintiff on Mar. 30, 1939. The defendants will contend that, by reason of the premises, the plaintiff is debarred from claiming or recovering any sum from the defendants in this action.

Thereupon an order was made in chambers under R.S.C., Ord. 52, r. 2, that the issues raised by that paragraph of the defence should be set A down for hearing and disposed of before the trial of the action. Thus, the case comes before me to have that issue determined.

This is apparently the first time that a person who has recovered judgment in the county court under the Employers' Liability Act, 1880, has sought to pursue a claim for negligence in respect of the same injuries B in the High Court. There is no authority expressly on the point. On behalf of the plaintiff, it is pointed out that the Employers' Liability Act, 1880, contains no such provision as is contained in the Workmen's Compensation Act, 1925, which expressly provides that a workman who has recovered compensation under that Act cannot pursue any C remedy in the High Court or in the county court, either at common law or under the Employers' Liability Act, 1880. It was urged that the cause of action under the Employers' Liability Act, 1880, was different from that which the plaintiff would have at common law, if he had been injured by the negligence of the defendants. On the D other side, it was said that the plaint under the Employers' Liability Act, 1880, is in reality an action based on negligence, and on nothing else, and that the Employers' Liability Act, 1880, conferred no new cause of action at all.

In those circumstances, it is necessary to look at the Employers' E Liability Act, 1880, to see whether in fact it gives the workman a cause of action different from that which he had at common law. Sect. 1 provides as follows:

> Where after the commencement of this Act personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or (2) by reason of the F negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or (4) by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in G that behalf; or (5) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

H Then the Act goes on to make certain exceptions, and then limits the amount recoverable, and limits the time within which the action must be brought. Then it provides for deduction from the money recoverable of anything which the workman has received in the way of money under any penalty which may have been paid in pursuance of any other Act of Parliament. Then it is provided that every action for recovery of compensation under this Act is to be brought in the county court, but may, on the application of either plaintiff or defendant, be removed into a superior court. Provision is also made for notice of the injury sustained being served on the employer.

It seems to me that the sole effect of the provisions of sect. 1 is that, when an action is brought under the Employers' Liability Act, 1880, although the workman is in fact a person in the service of the employer, the action is to be determined on the fiction that he was not in fact in the employ of the employer. It resembles somewhat what used to obtain in the procedure of the court before the Common Law Procedure Act in actions of ejectment. It is true that there was no such person as John Doe, and it was true that no demise had been made to John Doe, but, by the rules of the court, the defendant in such an action, on entering appearance, was bound to concede that John Doe did exist, and that a demise had in fact been made to John Doe. So, too, in an action under the Employers' Liability Act, 1880, in which the plaintiff was in fact a workman in the employment of the defendant, the defendant had to admit, contrary to the fact, that the plaintiff was not in the employment of the defendant.

In my view, there is nothing in the Employers' Liability Act, 1880, which confers on the injured workman any cause of action different from that which he would have had by the law of England but for the doctrine of common employment. The real effect of the Employers' Liability Act, 1880, is, as it has been generally understood, to preclude the employer, when sued in such an action, from setting up the defence of common employment. If I had any doubt about the matter, it is concluded by authority. Counsel engaged in the case have assisted me greatly by referring to all the cases which have any bearing on the matter, direct or indirect, and I think it is only necessary to refer now to *Thomas* v. *Quartermaine* (1). That was a decision of the Court of Appeal, consisting of Lord Esher, M.R., and Bowen and Fry, L.JJ. The headnote is as follows:

> The plaintiff was employed in a cooling room in the defendant's brewery. In the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only 3 ft. wide. The cooling vat had a rim raised 16 ins. above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. The board stuck fast, and then came away suddenly so that he fell back into the cooling vat and was scalded. In an action under the Employers' Liability Act, 1880 :—
>
> Held (by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting), that the defence arising from the maxim *volenti non fit injuria* had not been affected by the Employers' Liability Act, 1880, and applied to the present case, and that there was therefore no evidence of negligence arising from a breach of duty on the part of the defendant towards the plaintiff, and that the plaintiff was not entitled to recover.

In his judgment, Bowen, L.J., said, at p. 691 :

> Two alternative views have been submitted to us as to the effect of the Employers' Liability Act, 1880. Is the true conclusion that the Act has removed certain special obstacles to a workman's right to sue which would not have existed in the case of other persons, and which had been held previously to arise by implication out of the relation of master and servant; and that the Act has only placed an injured

workman (as regards his remedies) in the same position (with specified exceptions) as he would have occupied if he had not been in the master's employ? Or has the Act gone further, and imposed on masters new duties and liabilities towards their servants which the masters would not be under towards the general public or the servants of anybody else. This is the first question we have to solve.

Then BOWEN, L.J., proceeds to deal with the various arguments which led to the conclusion expressed in pp. 693, 694:

> The true view in my opinion is that the Act, with certain exceptions, has placed the workman in a position as advantageous as but no better than that of the rest of the world who use the master's premises at his invitation on business. If it has created any further or other duty to be fulfilled by the master I do not know what it is, how it is to be defined, or who is to define it.

Judgment to the same effect was delivered by FRY, L.J. Although LORD ESHER, M.R., dissented from the conclusion at which BOWEN and FRY, L.JJ., arrived, his decision was not on the point at issue in this case. It was on the question of whether or not the doctrine of *volenti non fit injuria* applied. The majority of the court held that it did apply. LORD ESHER, M.R., thought that it did not apply. For these reasons, I have come to the conclusion that the issue submitted to me must be decided in favour of the defendants, and that the action must stand dismissed.

Action dismissed.

Solicitors: *Scott Duckers & Co.* (for the plaintiff); *W. Stanley Eastburn* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

SOUTHERN FOUNDRIES (1926), LTD., AND FEDERATED FOUNDRIES, LTD. *v.* SHIRLAW.

[HOUSE OF LORDS (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **March 7, 11, 12, 13, April 22, 1940.**]

Companies—Directors—Managing director—Contract appointing managing director for term of years—Change of articles—Directorship of managing director terminated before expiration of term—Breach of contract—Implied terms.

S. was appointed managing director of S. F., Ltd., for a period of 10 years, the agreement being dated Dec. 21, 1933. The articles of that company, as they existed on that date, gave power to the company to appoint one of the directors as managing director, and provided that the managing director should be subject to the same provisions as to removal and resignation as those to which the other directors were subject but "subject to the provisions of any contract between him and the company." In Apr., 1936, S. F., Ltd., adopted a new set of articles, owing to F. F., Ltd., having acquired financial control of S. F., Ltd. The new articles gave power to F. F., Ltd., to remove from office any director of S. F., Ltd. On Mar. 25, 1937, F. F., Ltd., removed S. from his office of director of S. F., Ltd., and his appointment as managing director *ipso facto* terminated. It was contended that an implied term to the effect that S. F., Ltd., would not remove S. from his office of director could not be read into his contract:—

HELD (VISCOUNT MAUGHAM and LORD ROMER dissenting): the removal of S. from his office of director by F. F., Ltd., under the altered articles was a breach of contract on the part of S. F., Ltd., because, when F. F., Ltd., acted upon the power conferred on them by the new articles, they bound S. F., Ltd., if they acted in such a way that action by S. F., Ltd., on the same articles would be a breach. The alteration of the articles was not in itself a breach of contract.

per LORD ATKIN: it is not a question of agency, but of acting under powers conferred by contract, to interfere with a contract between the party granting the power and a third person. A

per LORD WRIGHT: a contract is a consensual agreement between A and B, between whom the rights and liabilities exist. I do not understand on what principle B can be ejected from his contractual rights by the stranger C, with whom he has no privity.

Order of Court of Appeal ([1939] 2 All E.R. 113) *affirmed.*

[**EDITORIAL NOTE.** This case has given rise to considerable difference of B judicial opinion and it is to be noted that the Chancery judges have ranged themselves on one side and the common-law judges on the other. It may, perhaps, be questioned whether this is not a decision upon the particular facts of this case, but the opinions of the majority would seem to support the proposition that if A gives a general power to B and B uses that power in a particular instance to alter the position of C, then, if C is a person having a contract with A, and the effect C of the particular exercise of the power by B is to bring about a breach of the contract between A and C, A is liable to C for breach of that contract. The general power could no doubt in many cases be exercised without in any way affecting any contractual rights, and therefore the giving of the power is in no way a matter of which complaint can be made.

AS TO MANAGING DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, p. 348, D para. 575; and FOR CASES, see Vol. 9, pp. 528-532, Nos. 3484-3513.]

Cases referred to:

(1) *Stirling* v. *Maitland* (1864), 5 B. & S. 841; 12 Digest 616, *5091*; 34 L.J.Q.B. 1; 11 L.T. 337.

(2) *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; 12 Digest 622, *5123*; 47 L.J.Q.B. 396; 34 L.T. 890. E

(3) *Allen* v. *Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656; 9 Digest 568, *3771*; 69 L.J.Ch. 266; 82 L.T. 210; *varying*, [1899] 2 Ch. 40.

(4) *Baily* v. *British Equitable Assurance Co.*, [1904] 1 Ch. 374; 9 Digest 559, *3698*; 73 L.J.Ch. 240; 90 L.T. 335; *revsd. on other grounds* S.C. *sub nom. British Equitable Assurance Co., Ltd.* v. *Baily*, [1906] A.C. 35. F

(5) *Swabey* v. *Port Darwin Gold Mining Co.* (1889), 1 Meg. 385; 9 Digest 561, *3724*.

(6) *Re Argus Life Assurance Co.* (1888), 39 Ch.D. 571; 10 Digest 1078, *7533*; 58 L.J.Ch. 166; 59 L.T. 689.

(7) *Measures Brothers, Ltd.* v. *Measures*, [1910] 2 Ch. 248; 9 Digest 529, *3494*; 79 L.J.Ch. 707; 102 L.T. 794. G

(8) *Mackay* v. *Dick* (1881), 6 App. Cas. 251; 12 Digest 610, *5045*.

(9) *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888), 39 Ch.D. 339; 9 Digest 528, *3490*; 59 L.T. 345.

(10) *Nelson* v. *Nelson (James) & Sons, Ltd.*, [1914] 2 K.B. 770; 9 Digest 529, *3492*; 83 L.J.K.B. 823; 110 L.T. 888.

(11) *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.*, [1935] A.C. 524; H Digest Supp.; 104 L.J.P.C. 88; 153 L.T. 425.

(12) *Bluett* v. *Stutchbury's, Ltd.* (1908), 24 T.L.R. 469; 9 Digest 529, *3491*.

APPEAL by the companies from an order of the Court of Appeal (MACKINNON and GODDARD, L.JJ., SIR WILFRID GREENE, M.R., dissenting), dated Mar. 17, 1939, and reported [1939] 2 All E.R. 113, affirming a judgment of HUMPHREYS, J., dated June 16, 1938, whereby it was ordered that the respondent should recover from the appellants £12,000 damages and costs. The facts and the arguments are fully set out in the opinions of their Lordships.

The articles of association of Southern Foundries (1926), Ltd., which regulated the position of the respondent as director at the time of his appointment included the following:

84. Until otherwise determined by a general meeting, the number of directors shall be not less than 2 nor more than 8. Subject to the rights of the holders of any of the debentures hereinafter mentioned for the time being outstanding 4 directors shall be appointed by the subscribers to the memorandum of association.

85. The qualification of a director shall be the holding in his own right alone, and not jointly with any other person, of not less than 200 ordinary shares of the company, and such qualification shall be acquired within 2 months after appointment as director.

89. Subject as herein otherwise provided or to the terms of any subsisting agreement, the office of a director shall be vacated : (A) If he become bankrupt or insolvent or compound with his creditors. (B) If he become of unsound mind or be found a lunatic. (C) If he be convicted of an indictable offence. (D) If he cease to hold the necessary qualification in shares or stock, or does not obtain the same within 2 months of the date of his appointment. (E) If he wilfully absent himself from the meetings of the directors for a period of 6 consecutive calendar months without special leave of absence from the other directors and they pass a resolution that he has by reason of such absence vacated his office. (F) If he gives the directors one month's notice in writing that he resigns his office. But any act done in good faith by a director whose office is vacated as aforesaid shall be valid unless prior to the doing of such act written notice shall have been served upon the directors or an entry shall have been made in the directors' minute book, stating that such director has ceased to be a director of the company. A director may hold any other office or place of profit under the company (except that of auditor) in conjunction with his office of director, and on such terms as to remuneration and otherwise as the directors shall arrange.

90. The directors may from time to time appoint any one or more of their body to be managing director or managing directors for such period and upon such terms as they think fit, and may vest in such managing director or managing directors such of the powers hereby vested in the directors generally as they may think fit and such powers may be made exercisable for such period or periods, and upon such conditions and subject to such restrictions and generally upon such terms as to remuneration and otherwise as they may determine. The remuneration of a managing director may be by way of salary or commission or participation in profits, or by any or all of these modes.

91. A managing director shall not while he continues to hold that office be subject to retirement by rotation, and he shall not be taken into account in determining the rotation of retirement of directors, but he shall, subject to the provisions of any contract between him and the company, be subject to the same provisions as to resignation and removal as the other directors of the company, and if he cease to hold the office of director he shall *ipso facto* and immediately cease to be a managing director.

98. Subject to the provisions of these articles, one-third of the directors for the time being (if any), or if their number is not a multiple of 3 then the number nearest to but not exceeding one-third, shall retire from office at the ordinary general meeting in 1927 and in every subsequent year.

105. The company may by extraordinary resolution remove any ordinary director before the expiration of his period of office, and may, if thought fit, by ordinary resolution appoint another director in his stead ; but any person so appointed shall retain his office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election.

Arts. 7 and 8 of the new articles adopted in April, 1936, provided as follows :

7. The number of the directors shall be not less than 2 or more than 10.

8. Subject to the immediately preceding article, Federated Foundries, Ltd., shall have power at any time and from time to time by an instrument in writing

subscribed on its behalf by 2 of its directors and its secretary to appoint any person to be a director of the company and to remove from office any director of the company. Every such instrument shall be deposited at the registered office of the company and shall take effect as at the time of such deposit.

Art. 11 provided as follows:

> . . . that the directors should not have power except with the prior sanction of the Federated company. . . . (*b*) to appoint any person to be a managing director. . . .

These articles also incorporated Table A, with the omission of certain of the articles. Art. 68, dealing with the appointment of a managing director, was retained, and was in the following form:

> The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

Art. 72, dealing with the vacation of the office of director, and arts. 73-80, dealing with the rotation and removal of directors, were struck out.

Valentine Holmes and *J. G. Strangman* for the appellants.

H. U. Willink, K.C., and *J. P. Ashworth* for the respondent.

Viscount Maugham: My Lords, the facts in this case are not in dispute, and may be stated as follows. The appellants (whom I shall call Southern) were incorporated in 1926 as a private company with the object of carrying on the business of iron-founders. The respondent became a director of Southern in 1929.

On Dec. 21, 1933, an agreement was entered into between Southern, the respondent, and Sir Berkeley Sheffield (who was at that time the holder of all the debentures, and nearly the whole of the capital, of Southern) whereby the respondent was appointed managing director of Southern for a term of 10 years. The agreement contained, amongst others, the following clauses:

> 1. Mr. Shirlaw shall be and he is hereby appointed managing director of the company and as such managing director he shall perform the duties and exercise the powers which from time to time may be assigned to or vested in him by the directors of the company.
>
> 2. Mr. Shirlaw shall hold the said office for the term of 10 years from Dec. 1, 1933.
>
> 3. Mr. Shirlaw shall unless prevented from ill-health throughout the said term devote the whole of his time attention and abilities to the business of the company (subject however to cl. 10 hereof) and shall obey the orders from time to time of the board of the company and in all respects conform to and comply with the directions and regulations made by such board and shall well and faithfully serve the company and use his utmost endeavours to promote the interests thereof.
>
> 9. If before the expiration of this agreement the tenure of office by Mr. Shirlaw shall be determined by the winding up of the company (other than for the purpose of reconstruction or amalgamation) Mr. Shirlaw shall have no claim against the company or Sir Berkeley Sheffield for damages in respect of such determination.

The agreement provided for payment to the respondent as managing director of a salary of £1,700, rising by annual increments of £100 to £2,000 per annum, and of commission at the rate of 5 per cent. on the net profits of the company available for dividend in any year. The respondent bound himself not during the continuance of the agreement or within 3 years after its termination without the consent of the company to carry on or be engaged in the business of a foundry within 100 miles of the company's works at Croydon. The agreement also A contained provisions relating to the furnishing by Sir Berkeley Sheffield of finance for a company named Steel Parts, Ltd., in which the respondent was interested. Clause 10 (referred to in cl. 3) provided that the respondent might hold a directorship in Steel Parts, Ltd., and devote a specified part of his time to that company.

B In 1935, it was agreed by Southern and some 10 other companies engaged in similar businesses to effect what was called an ironfounders' merger, and with that object in view the appellants Federated Foundries, Ltd. (whom I shall call Federated), were incorporated on Dec. 6, 1935. The amalgamation was carried through by transfers of all the shares C in the capital of the associated companies to Federated or its nominees on the terms of the accountants' report. The holders of the shares so transferred were to receive, and did receive, in exchange allotments of preference and ordinary shares in Federated credited as fully paid. Part of the arrangement for amalgamation was that the associated D companies would adopt new articles of association in similar terms. This was done at extraordinary general meetings of the companies, the resolution in the case of Southern being passed on Apr. 17, 1936. The matter had been completed by Apr. 23, 1936, except that certain transfers of shares had to be executed in relation to qualification shares E in the associated companies, and, in order to provide the associated companies with one shareholder in addition to the Federated, one share in each of those companies had to be transferred to a nominee of Federated. When all these things had been done, the position was that Federated owned beneficially every share in each of the associated F companies, and was in complete control of those companies, each of which had adopted new articles of association in order to make such control effective to the same extent in relation to each of those companies. The new articles were very different in many respects from the previous articles of the associated companies, including those of Southern. G Table A of the First Schedule to the Companies Act, 1929, so far as not excluded or altered, was to apply, but the articles as regards the directors were almost entirely new. [His Lordship read arts. 7 and 8 of the new articles and art. 68 of Table A.]

Table A, art. 72, which provides that the office of director shall be H vacated in a number of events, including bankruptcy, lunacy, and resignation in writing, was not incorporated, and apparently the only way of terminating the appointment is under art. 8.

The new article clearly put it in the power of Federated to remove the respondent from his office as a director whenever it seemed to Federated desirable so to do. Directors of the other companies were in the same position. There is no suggestion, however, that this article was aimed in any way at the respondent, or that it was unreasonable from the point of view of an amalgamation of the interests of the 11 companies. Nor is it pleaded in the action that the adoption of the articles was a breach of the contract of Dec. 21, 1933, and counsel for the respondent disclaimed at the bar any intention to set up such an argument. It must, therefore, be accepted that the articles of Southern were lawfully and properly changed, without a breach of the contract with the respondent.

There is no reason to think that the events which followed and led to this action were anticipated by any of the parties. Negotiations took place in Nov., 1936, and subsequently between Federated and the managing directors of the associated companies, including, of course, the respondent, with a view to the adoption of fresh agreements with all the managing directors. The respondent declined to accept the new agreement proposed to be entered into between himself and Southern, the terms of which were less favourable to him than those of the existing agreement. After various efforts to settle the dispute, on Mar. 25, 1937, the directors of Federated came to the conclusion that an exception could not be allowed in the respondent's case from the principle that the managing directors of all the associated companies should accept the new agreements offered by Federated in lieu of their current agreements (as all the other managing directors had done), and a resolution was passed that the respondent be removed forthwith from the board of Southern. On Mar. 25, 1937, an instrument in writing removing the respondent from his office as a director of Southern was signed on behalf of Federated by 2 directors and the secretary, and was delivered to Southern and deposited at the registered office of Southern on Mar. 27, 1937. The respondent thereupon ceased to be a director of Southern, and, as is admitted, necessarily ceased at the same time to be the managing director of Southern.

The respondent issued his writ on June 10, 1937, against Southern and Federated. The statement of claim (para. 4) alleges that Federated wrongfully resolved to remove the plaintiff from his directorship of Southern, and purported to do so by the instrument in writing of Mar. 25, 1937. Para. 5 alleges that Southern adopted and accepted the removal, and thereby wrongfully repudiated the agreement of Dec. 21, 1933, or, alternatively, have treated the plaintiff's appointment as managing director as terminated, and have refused to allow him to perform his duties as managing director. There is no other breach of contract alleged. The claim against Federated (para. 6) is that that defendant wrongfully caused and induced Southern to be guilty of "the aforesaid breaches of the said agreement." It was agreed in the Court of Appeal and before your Lordships that, if the claims against Southern were well-founded, Federated were also liable for the reason alleged. I need not, therefore, say anything further on this part of the case. The trial judge (HUMPHREYS, J.) decided in favour of the respondent and gave judgment in his favour for £12,000 and costs. The Court of Appeal (MACKINNON and GODDARD, L.JJ., SIR WILFRID GREENE, M.R., dissenting) affirmed HUMPHREYS, J.

My Lords, I think that this case, like many cases which involve
A written agreements between limited companies and their officers—agreements which are necessarily affected to some extent by the articles of association—is a difficult case. It is indisputable that the agreement of Dec. 21, 1933, did not and could not appoint the respondent to be a director of Southern. He had already been appointed to be a director
B in the only possible way—namely, according to the articles—and it is plain, I think, that he would cease to be a director in any of the events specified by the articles. If some new terms as to his directorship were desirable, the only course was to alter the articles. It is equally indisputable, as I think, that the respondent would cease to be managing
C director as soon as he ceased to be a director, and that, as SIR WILFRID GREENE, M.R., pointed out, the two positions, that of director and that of manager, involve different qualifications, duties and responsibilities. It is quite erroneous, in my opinion, to contend that there was anything in the provisions of art. 89 (above set forth) which did not apply to the
D respondent after the agreement, though, on the other hand, it is possible that there was an implied term in the agreement that he would not during the 10 years give notice to resign his office, and would be committing a breach of this implied agreement if he did.

There are, however, a number of difficult questions which do arise
E as to the agreement, and one or two of them require an answer. In my opinion, it is quite impossible, having regard to art. 89, to treat the agreement as containing any sort of guarantee that the respondent should remain a managing director during the term of 10 years. That suggestion, indeed, has been given up. It is, I think, equally impossible
F to agree to the argument which was pressed upon the Court of Appeal that it was an implied term that the respondent should not cease to hold the office of director "by any means within the control of himself or the company." For myself, I agree with nearly the whole of the judgment of SIR WILFRID GREENE, M.R. The only doubt I have felt
G is in regard to the well-known principle laid down by COCKBURN, C.J., in *Stirling* v. *Maitland* (1), at p. 852:

> . . . if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

H This, as SIR WILFRID GREENE, M.R., observed, is not a rigid rule. It is capable of qualifications in any particular case, and it is a rule the application of which depends on the true construction of the agreement. An excellent example of this is to be found in the decision of this House in *Rhodes* v. *Forwood* (2), at pp. 256, 274, where the rule contrary to the decision of the Exchequer Chamber was held to be inapplicable. On the whole, however, I have come to the conclusion in this case, reading the agreement in the light of the surrounding circumstances, that a negative stipulation such as that formulated by COCKBURN, C.J., may properly be implied, but, in my opinion, the words "of his own motion" should be borne in mind, and the implication must be taken to extend only to direct acts, and not to the indirect and unforeseen consequences A which may follow from acts of the party which, on the face of them, do not necessarily, or even probably, alter "that state of circumstances under which alone the arrangement can be operative." In my view, it would be unwarrantable in this case to imply a term that the articles of Southern should not be altered, however essential it was in the B interests of the company, merely because such an alteration might possibly at some future date lead to the termination of the respondent's position as a director. The right of a company under the Companies Act, 1929, s. 10, to alter its articles is statutory. It is conferred in the widest terms, and is, I think, subject only to the implied qualification C that it must be exercised in good faith for the benefit of the company (*Allen* v. *Gold Reefs of West Africa, Ltd.* (3), at p. 671), but the alteration may not excuse a breach of contract, for which the company may be liable in damages: *Baily* v. *British Equitable Assurance Co.* (4), at p. 385. D

The right to alter the articles being inherent, if it is desired by a contract to give an employee or a third person a right of action if there should be an alteration of the articles which causes damage to him, I think it is very desirable to express such a term in clear language. Such a prohibition cannot be implied without very strong reasons: *Swabey* E v. *Port Darwin Gold Mining Co.* (5), *Re Argus Life Assurance Co.* (6) and *Baily* v. *British Equitable Assurance Co.* (4). In my opinion, it would have been a breach of the negative term, properly understood, for Southern to have removed the respondent under art. 105 from his position as director during the 10 years. I am also of opinion, however, F that it was not a breach of any implied term in the agreement for Southern to alter its articles as was done, and to include in the altered articles the new art. 8. I may add that cl. 9 of the agreement shows clearly that the exact words of the term suggested by COCKBURN, C.J., would not be applicable without some qualification, for that clause G makes it clear that Southern could wind up and distribute its assets without committing a breach of the agreement, though that would involve the dismissal of the respondent. For the above reasons and those given by SIR WILFRID GREENE, M.R., I cannot agree with the view of MACKINNON, L.J., that we can properly imply a term in the H agreement that the company should not exercise *or create* any right to remove the respondent from his directorship, if that involves the results of an alteration of the articles. It seems to me that a winding-up resolution would be within these words. Nor can I agree with the opinion of GODDARD, L.J., that it was a breach of the agreement for Southern to put it within the power of some other person or company under new articles and in different circumstances to remove the respondent. After all, an implied term ought to be one which the parties must necessarily have intended at the date of the agreement, and I do not myself think that either of the parties can be taken to have been providing for a state of things which would result from the *de facto* amalgamation of interests, which no one contemplated at the date of the agreement, but which in fact took place.

My Lords, the question which remains is whether the act of Federated, under art. 8 of the articles of Southern, in removing the respondent from his office of director of that company by an instrument in writing signed by two directors and the secretary of Federated, was a breach by Southern of its agreement with the respondent, or a repudiation of that agreement. It was the act of Federated which had the effect of removing the respondent from his directorship. After the new articles had been adopted, Southern was powerless to prevent that act. Southern, indeed, was completely controlled by Federated, who held beneficially every share in Southern, as in all the other associated companies. With all respect to those who think otherwise, I cannot understand the suggestion that Federated was acting as an agent or, which is the same thing, as a mandatory, of Southern in that matter, since Southern had not—and, indeed, never had—any power or influence whatever over Federated. It held not a single share in Federated. It was Federated who held the shares in Southern. Nor was there any contractual relation between Federated and Southern which might have enabled Southern to object to the act of Federated under art. 8. I think that I understand the doctrine of anticipatory breach, but it is not alleged to apply here. If, under an agreement between A and B, A can lawfully do an act (for instance, by a sale of property) which gives power to an independent third party, C, to do a number of things, some one of which may injure B, I do not see that A can be sued for a breach of the agreement which he cannot prevent. I repeat that it is not alleged in the pleadings or at the bar that the adoption of the new articles by Southern was a breach of the contract with the respondent, or was done in bad faith as regards him. If A enters into a contract of service with B, and then gives power to C to discharge B, and C does so contrary to the terms of the contract, A is plainly liable, because C has acted with his authority, and, in that sense, as his agent, in breaking the contract. In the present case, however, the contract is between a limited company and a director, and it was an implied term of the contract that the company by altering its articles could give wide powers to a third party, including a power to dismiss the company's directors. B cannot complain if he is so dismissed by the third party, for it is, as I think, impossible for B to take up the position that he is bound under his contract by the new articles, but can sue the company for breach of that contract based on things lawfully done under the new articles.

My Lords, in my opinion, it has not been established in this case that Southern has committed any breach of the agreement or has repudiated the agreement, and the action therefore fails. At the conclusion of his judgment, SIR WILFRID GREENE, M.R., expressed a view on the hypothesis, which he did not accept, that a certain implied undertaking, which I think his colleagues were accepting, had been broken. I do not think that he would have expressed himself as he did if the hypothesis had included a statement that the alteration of the articles and the insertion of art. 8 were not prohibited by any implied term in the agreement. For the reasons stated, I should be in favour of allowing this appeal. However, if a majority of your Lordships are of a contrary opinion, it must be dismissed.

LORD ATKIN: My Lords, the question in this case is whether the appellant company have broken their contract with the respondent, made in Dec., 1933, that he should hold the office of managing director for 10 years. The breach alleged is that, under the articles adopted by the company after the agreement, the respondent was removed from the position of director of the company by Federated Foundries, Ltd. There can be no doubt that the office of managing director could only be held by a director, and that, upon the holder of the office of managing director ceasing for any cause to be a director, the office would be *ipso facto* vacated. Under the articles in existence at the date of the agreement, by art. 89 the office of a director could be vacated on the happening of 6 various events, bankruptcy, lunacy, etc., including the giving by the director of one month's notice to resign, while by art. 105 the company by extraordinary resolution could remove him from his office. I feel no doubt that the true construction of the agreement is that the company agreed to employ the respondent, and the respondent agreed to serve the company, as managing director for the period of 10 years. It was, by the constitution of the company, a condition of holding such office that the holder should continue to be a director, and such continuance depended upon the terms of the articles regulating the office of director. It was not disputed, and I take it to be clear law, that the company's articles so regulating the office of director could be altered from time to time, and, therefore, the continuance in office of the managing director under the agreement depended upon the provisions of the articles from time to time. Thus the contract of employment for the term of 10 years was dependent upon the managing director continuing to be a director. This continuance of the directorship was a concurrent condition. The arrangement between the parties appears to me to be exactly described by the words of COCKBURN, C.J., in *Stirling* v. *Maitland* (1), at p. 852:

> . . . if a party enters into an arrangement which can only take effect by the continuance of an existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

That proposition, in my opinion, is well-established law. Personally, I should base the law, not so much on an implied term, as on a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself " of his own motion " bringing about the impossibility of performance is in itself a breach. If A promises to marry B, and, before performance of that contract, marries C, A is not sued for breach of an implied contract not to marry anyone else, but for breach of his contract to marry B. I think it follows that, either if the company of its own motion removed the respondent from the office of director under art. 105, or if the respondent caused his office of director to be vacated by giving one month's notice of resignation under art. 89, either of them would have committed a breach of the agreement in question. As KENNEDY, L.J., said in *Measures Brothers, Ltd.* v. *Measures* (7), at p. 258, in discussing this very question of the effect upon a contract of employment as managing director of the managing director resigning his office of director, it is elementary justice, that one of the parties to a contract shall not get rid of his responsibilities thereunder by disabling the other contractor from fulfilling his part of the bargain. I cannot agree with the view of the contract taken by SIR WILFRID GREENE, M.R., that the parties must be taken to have agreed that the term, though expressed to be for 10 years, was subject to be determined by any cause, including the will of either party expressed in accordance with the articles, and that such determination, therefore, could not constitute a breach. I should have construed the agreement as I do on the first two clauses alone, but the remaining clauses, and particularly those dealing with the mutual obligations between the respondent and Sir Berkeley Sheffield in this tripartite agreement, in my view, strongly reinforce that construction. I agree, therefore, with the trial judge, with the majority of the Court of Appeal, and with, I believe, all your Lordships, in thinking that, if during the term the respondent had given a notice of resignation, or if the company had exercised its power of removal under art. 105, either would have committed a breach of the contract.

The question which remains is whether, if the removal by the company would have been a breach by the company, the removal under the altered articles by Federated Foundries, Ltd., was a breach by the company. In this matter, SIR WILFRID GREENE, M.R., agreed with the other members of the Court of Appeal, but all the members of this House are not agreed. My Lords, it is obvious that the question is not as simple as in the case just considered of the removal being by Southern Foundries, Ltd., but I venture respectfully to think that the result must be the same. The office of director involves contractual arrangements between the director and the company. If the company removes the director, it puts an end to the contract. Indeed, the contract relations cannot be determined except by events stipulated for in the contract, by operation of law, or by the will of the two parties. The altered art. 8, which gives power to Federated Foundries, Ltd., to remove from office any director of the company, is, when analysed, a power to Federated to terminate a contract between Southern and its director. It is an act which binds Southern as against its promisee, and, if a wrong to the respondent if done by Southern, it surely must be a wrong to the respondent if done by Federated, who derive their power to do the A act from Southern only. If a landlord gives power to a tenant to discharge the landlord's servants, gardener or gamekeeper, it is the master, the landlord, who is bound by the consequences of that discharge, whether rightful or whether wrongful and so involving the payment of damages. If a man buys goods and contracts with a subpurchaser to B take delivery direct from his vendor, and contracts with his vendor to give delivery to the subpurchaser, the latter's recourse for breach of contract to deliver is against his own intermediate seller, and not against the head vendor. If, then, Federated of their own motion determine the concurrent condition, it appears to me that necessarily they cause C Southern to break the contract. I can quite see that the position may be altered where Federated remove a director from office for such reasons as those contained in the old art. 89, or in Table A, art. 72, which was not incorporated in the new articles. In such a case, it may well be said that the company is not acting of its own motion, but is reasonably D moved to act by the acts or omissions of the director. In the present case, however, no such question arises. The action of Federated was, I think I may say, avowedly taken for the sole purpose of bringing the managing director's agreement to an end. I do not think that it could be said that Southern committed any breach by adopting the new articles, E but, when Federated acted upon the power conferred upon them in the new articles they bound Southern if they acted in such a way that action by Southern on the same articles would be a breach. It is not a question of agency, but of acting under powers conferred by contract to interfere with a contract between the party granting the power and a third F person. For these reasons, I am of opinion that this appeal should be dismissed with costs.

Lord Wright: My Lords, the respondent in this action is claiming damages from the appellants for breach by them of their contract to G employ him as managing director for 10 years. The respondent has been held entitled to succeed in his claim for damages by **Humphreys**, J., and, in the Court of Appeal, by **MacKinnon** and **Goddard**, L.JJ., **Sir Wilfrid Greene**, M.R., dissenting. The only claim considered in this House has been that against Southern Foundries (1926), Ltd. A claim H against the second company for procuring a breach of contract has wisely been withdrawn.

The agreement founded upon, which was under seal dated Dec. 21, 1933, was made between the appellant company and the respondent and Sir Berkeley Sheffield. The provisions directly material to this appeal are those between the appellant company and the respondent. Clauses 1 and 2 must be quoted in full:

> 1. Mr. Shirlaw shall be and is hereby appointed managing director of the company and as such managing director he shall perform the duties and exercise the powers which from time to time may be assigned to or vested in him by the directors of the company.
>
> 2. Mr. Shirlaw shall hold the said office for the term of 10 years from Dec. 1, 1933.

Then followed clauses providing for the faithful discharge of his obligations. He was to be paid a commencing salary of £1,700 per annum, rising by annual increments to £2,000, and, further, a commission on net profits. Clauses 8 and 9 provided as follows:

> 8. If Mr. Shirlaw shall fail for 6 consecutive months to fulfil his obligations to the company hereunder the company may by notice in writing determine this agreement.
>
> 9. If before the expiration of this agreement the tenure of office by Mr. Shirlaw shall be determined by the winding up of the company (other than for the purpose of reconstruction or amalgamation) Mr. Shirlaw shall have no claim against the company or Sir Berkeley Sheffield for damages in respect of such determination.

There were other clauses not directly material. The respondent agreed to be subject to stringent restrictive covenants for 3 years after the termination of the agreement. Sir Berkeley Sheffield, who was a director of the appellant company, agreed to pay the respondent his living expenses in London for a period and the cost of removing himself and his family from Birmingham to London.

This agreement is unqualified in regard to the term of 10 years, save in the two events in which the appellant company was to be entitled to determine the agreement before the expiration of the term. Apart from the express language, however, the period of 10 years is also qualified by the general rules of the law of employer and employed. Thus, the agreement would end if the respondent were to die or become permanently incapacitated, and the appellant company would presumably have a right to dismiss him on the ground of misconduct, as, for instance, embezzlement, or disgraceful conduct leading to conviction for an indictable offence. These and similar matters would not specifically fall within cl. 8. The employment has a double aspect. The respondent is both manager and director. It is clear merely *ex vi termini* that the respondent could not cease to be director, without ceasing to be managing director. The directorship is an integral and necessary element in the composite office. Hence, if the appellant company were to remove him from his directorship during the term, save for some legal excuse, they would necessarily break their agreement to employ him for 10 years as managing director. To do so would be a breach of their express promise, and not of any implied term. The articles of association are not referred to in the agreement, but the respondent's claim in this case would not be prejudicially affected by anything in the articles of association as they existed at the date of the agreement. Art. 90 gave the directors power to appoint out of their body a managing director or directors for such period and upon such terms and with such powers as they should think fit. Art. 91 provided that a managing director should not, while in the office, be subject to retirement by rotation:

> . . . but he shall subject to the provisions of any contract between him and the company be subject to the same provisions as to resignation and removal as the other directors of the company and if he ceases to hold the office of director he shall *ipso facto* and immediately cease to be a managing director. A

Art. 91 was thus expressly subject to the provisions of the agreement, so far as—or rather, if in any event—it should conflict with the provisions of the agreement, such as the 10-years' term of engagement. It is also necessary to mention art. 89, which contained an enumeration of events upon any one of which the office of a director should be vacated, such as bankruptcy or insolvency, lunacy, conviction of an indictable offence, and similar matters which do not affect this case. Head (F) calls for special notice. It provides that the office of a director is to be vacated: B

> If he gives the directors one month's notice in writing that he resigns his office. C

That provision is clearly excluded under art. 91 as being inconsistent with the agreement to serve for 10 years under cll. 1, 2 and 3. The respondent could not without just cause rightfully give such a notice. That is, if he did so, he would break his agreement and be liable to a claim for damages. However, as the agreement would not be specifically D enforced against him, his resignation, though a breach of contract, would have the effect of vacating his directorship, and hence his office as managing director. In the same way, art. 105, which empowers the company by extraordinary resolution to remove any director, is equally excluded in the case of a managing director by art. 91. If the company E under art. 105 had passed an extraordinary resolution to remove the respondent during his term of 10 years, he would no doubt have ceased to hold office, because a claim by him for specific performance or kindred relief would, I assume, fail, but the removal would have been a breach of the agreement, unless for good cause. F

In the result, then, the articles, if they were regarded as qualifying the express agreement, would not in any substantial respect affect it. In my opinion, the appellant company would beyond question have been guilty of a breach of contract sounding in damages if without just cause they had removed him from his directorship and thus terminated his G tenure of office, as was done in Apr., 1937, in the circumstances which will appear later. The case would have been simply a case of wrongful dismissal of a servant or employee. The servant or employee is, in such a case, effectively dismissed. His employment is terminated, but the termination is wrongful, and the employer has to answer in damages. H The employers here are the appellant company, but for this purpose they are like any other employers. The articles may give them the power to dismiss, but the power to dismiss is to be distinguished from the right to dismiss. I do not think that in this particular case the fact that the office includes that of a director affects this conclusion. It is said that it is impossible to accept that a company would guarantee to a director a 10-years' tenure of his office. The answer is, however, that they have actually done so, according to the terms of the contract, though subject to the express exceptions of the contract and to the general exceptions which the law reads into the contract. The word "guarantee" is A inappropriate. No one, individual or company, can be compelled against his or their will to employ a man, though, if the contract is broken, damages will have to be paid. When the respondent was appointed managing director for 10 years, the contract necessarily meant that the appellant company would not without good cause remove him from his B directorship during that period, because, if they did so, they would *ipso facto* terminate his employment. There is no question of implying a term that the appellant company would not remove the respondent from his directorship. He could not serve for the agreed term of 10 years unless the appellant company continued him in his office. As LORD C BLACKBURN said in *Mackay* v. *Dick* (8), at p. 263:

> . . . where in a written contract it appears that both parties have agreed that something shall be done, [as here that the respondent shall hold office for 10 years] which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing . . .

D The agreement involved for its fulfilment the concurrence of the appellants and the respondent, and imported that each should do its part in carrying it out.

The question in the case, however, arises out of an alteration in the articles of association made in 1936, when the agreement had still about E 7 years to run. It had been decided to effect a combination of the operations of a number of companies engaged in the iron foundry trade, including the appellant company. A new company was incorporated, named Federated Foundries, Ltd., with that object, and it acquired the whole share capital of these companies. The respondent took part F in these transactions, and became one of the first directors of Federated Foundries, Ltd., and was present at a meeting of the board of that company which unanimously resolved that each of the amalgamated companies should adopt similar articles of association. On Apr. 17, 1936, at an extraordinary general meeting of the appellant company, G at which the respondent was present, it was unanimously resolved by a special resolution that the existing articles of association should be abrogated and new articles decided upon by the Federated company should be adopted. It is not suggested that the action of the respondent as a director or shareholder had any bearing on his contractual rights. H Of these new articles, art. 8 is so material that it should be set out *in extenso*. [His Lordship read the article set out above.]

Art. 68 made a managing director's appointment subject to determination if for any cause he should cease to be director, and omitted the reservation of existing contracts. It likewise gave the company power to determine the tenure of a managing director's office.

Negotiations took place between the respondent and the appellant company in which it was sought to vary the terms of the respondent's appointment, but these failed. On Mar. 23, 1937, Federated Foundries, Ltd., served on the appellant company a notice pursuant to the new art. 8, whereupon under that article his appointment as director terminated, and consequently by Table A, art. 68, his appointment as A managing director also terminated. The question is, however, whether the appellants can claim that it was rightfully terminated, and can resist the judgment for damages made against them. Assuming that there was the power under the articles to terminate the appointment, I repeat that the power to dismiss and the right to dismiss are two B different things. This is true both of companies and of individuals in their capacity of employers. The appellant company, however, take a more subtle point. They say that the employment was in fact terminated, but not by them, or by their responsibility, but by an outside person, Federated Foundries, Ltd., exercising the powers vested in that company C by the appellant company when it altered its articles in 1936.

Before dealing with this submission, it will be convenient to refer shortly to certain authorities. In *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (9), the question arose whether the managing director, who had been rightfully dismissed, was entitled to be paid his salary quarterly D or yearly. The articles provided that salaries were to be paid quarterly. COTTON, L.J., said, at p. 359:

> What we have to consider is not whether, as a shareholder, he could have insisted on their performing that agreement, but whether, under the contract by which he agreed to be managing director of the company, he had that right . . .

E

It was held that the contract prevailed. The converse case is illustrated by *Allen* v. *Gold Reefs of West Africa, Ltd.* (3), where it was held that a company, by altering its articles under which there was no lien on fully paid shares so that the altered articles did impose such a lien, could enforce that lien against a shareholder indebted to the company. The F members' rights depended on the articles, which were altered in good faith by the company under its statutory powers. However, LINDLEY, M.R., observed, at p. 672:

> . . . it does not by any means follow that the altered articles may not be inapplicable to some fully paid up shareholder. He may have special rights against the company, which do not invalidate the resolution to alter the articles, but which may exempt G him from the operation of the articles as altered.

Later, at p. 673, he considers the case of a special contract made with a company in the terms of, or embodying, one or more of the articles, and adds that this may raise the question whether in such a case an alteration of the articles so embodied is consistent or inconsistent with the real H bargain between the parties. He points out, at p. 673, that "a company cannot break its contract by altering its articles." LINDLEY, M.R., is emphasising the distinction between power or capacity and right. ROMER, L.J., at p. 680, said that the shares became bound by the company's alteration of its articles unless he [the shareholder] could show some special bargain with the company or some special obligation incurred towards him by the company in respect of his fully paid up shares. This he failed to do. The alteration must, of course, be made in good faith.

In *Baily* v. *British Equitable Assurance Co.* (4), the question related not to articles of association, but to bye-laws, of the insurance company. The Court of Appeal treated the bye-laws as comparable to articles of association and the question as being whether the alteration of the bye-laws which prejudiced the rights of policyholders as regards sharing in profits was effective against them under the principles laid down in *Allen's* case (3). COZENS HARDY, L.J., delivering the judgment of the court, said, at p. 385:

> It would be dangerous to hold that in a contract of loan or a contract of service ... there is any greater power of variation of the rights and liabilities of the parties than would exist if, instead of the company, the contracting party had been an individual. A company cannot, by altering its articles, justify a breach of contract.

This expression of opinion, with which I agree, is very pertinent to this case. That case came to this House, which reversed the decision of the Court of Appeal, on the ground that no special contract existed but did not question the principle stated by the Court of Appeal.

In *Nelson* v. *Nelson (James) & Sons, Ltd.* (10), the plaintiff was appointed managing director of the defendant company under an agreement which provided that he was to hold the office so long as he should remain a director of the company and should perform his duties efficiently. The appointment was made under articles of association which empowered the directors to appoint the managing director for such period as they deemed "fit, and might revoke the appointment." The Court of Appeal held that the directors' power was in effect to appoint for a fixed time, and that this power was inconsistent with a power in the board to revoke the appointment at any time. As SWINFEN EADY, L.J., said, at p. 781:

> . . . the power to appoint and the power to revoke the appointment are in the board, but the power to revoke is to be subject to the terms of the contract for the time being between the managing director and the company.

Hence, when the directors dismissed the plaintiff without just cause while still fulfilling the conditions of his contract, he was held entitled to recover damages for wrongful dismissal against the company. It follows, I think, in the present case that, if the appellant company had dismissed the respondent under either art. 105 of the original articles or art. 8 of the altered articles (assuming for the moment that the power to remove was vested in them), they would have committed a breach of their contract, there not being any just cause for dismissal. The special bargain would override the article. The article must be construed either as not applying to the respondent or as qualified by, and subject to, the express contract.

However, the appellant company rely on the further point to which I have referred, which is that the altered art. 8 vests in Federated Foundries, Ltd., the right to remove a director by means of a written instrument

deposited at the appellant company's office. The article has been validly passed by the appellant company. Under that article, it is claimed, the respondent has been removed from his directorship. He has not been removed, it is said, from his office of managing director, though that consequence follows inevitably. In that removal, the appellant company say they have no part or lot and no responsibility. It is the act of an A
independent person, but, all the same, is effective to terminate the employment. If it is a wrongful termination, the appellant company are not liable for it, and hence are entitled to succeed in this appeal. Such is the argument. The appellant company's case on this point found favour with no member of the Court of Appeal. It depends purely B
on a question of the law of contract. For the reasons already explained, I do not consisider that questions of company law—for instance, those relating to the original or altered articles—materially affect the question. They go to questions of powers as between the two companies, whereas the question is as to the right to dismiss. As I follow the appellant company's C
case, it is that a contract between A and B can, apart from any express or implied condition in the contract, be dissolved at the will of C, a stranger to the contract, without the consent of B, one of the contracting parties. It is contended that this is so because, by an arrangement between A and C, A has vested this power in C. No authority is cited D
to justify such a proposition. A contract is a consensual agreement between A and B, between whom the rights and liabilities exist. I do not understand on what principle B can be ejected from his contractual rights by the stranger C, with whom he has no privity. The appellants promised that the respondent should hold the office of managing director E
for 10 years, subject to the express or implied conditions. The appellants now have to justify his removal while the contract period was running. No doubt there might be cases in which, apart from the contract provisions, the appellants could resist a claim for damages. There might, for instance, be a change in the law, or there might be a requisition by F
the government of the works and undertaking of the appellant company which might in certain events frustrate and dissolve the contract irrespective of the will of the parties. Even in such cases, however, it has been held that the requisition must not be self-induced, to use the phrase employed in *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (11). G
Even if the present case were, what it was not, analogous to such a case, the appellants could not say that the intervention of Federated was not self-induced, since in fact, if art. 8 had not been adopted in place of the earlier articles, Federated would have had no power to intervene. It is clear, however, that such intervention has no analogy to a requisition H
by government or to any change by operation of law. It follows from a private arrangement between Southern and Federated, which is *res inter alios acta* so far as concerns the respondent's contractual rights, even if in fact it terminates his directorship and managing directorship. Apart from government interference, or the like, the contract can only

rightfully be dissolved by the will of the parties who entered into it. That will may be evinced by the conditions, express or implied, which were originally agreed to, and by action in accordance with them, or by a subsequent agreement to rescind the contract. Nothing of the sort, however, can be shown by the appellants. They have to justify the determination of the contract, or the case will be one of breach or repudiation. If their only justification is the action of Federated, that, in my opinion, is no defence. The alteration of the articles did not constitute a breach of contract by the appellant company as against the respondent, but his removal the following year did, and entitled him to damages. In my opinion, the appellant company fail in their defence, and the appeal should be dismissed.

Lord Romer: My Lords, the question to be determined upon this appeal is whether the appellants Southern Foundries (1926), Ltd., to whom I shall hereafter refer as Southern, have committed a breach of any of the obligations, express or implied, imposed upon them by their contract with the respondent of Dec. 21, 1933. If they have not, the respondent has no cause of action against either Southern or their co-appellants, Federated Foundries, Ltd., and this appeal must necessarily succeed. That there has been no breach by Southern of any express provision of this agreement is, in my judgment, quite plain. It is true that the respondent was appointed managing director of Southern for ten years from Dec. 1, 1933, and that Southern ceased so to employ him on Mar. 27, 1937, but that was because on this latter date he ceased to be a director of Southern. His appointment as managing director for 10 years was necessarily subject to the implied qualification "if he shall so long remain a director," because, as was pointed out by Sir Wilfrid Greene, M.R., a managing director who is not a director is a contradiction in terms, and also because of the concluding words of art. 91 of Southern's original articles of association. If, therefore, any one of the events specified in art. 89 of Southern's original articles of association had occurred, or Southern had removed the respondent from the board under the power conferred upon it by art. 105, the appointment of the respondent as managing director would have come to an end in accordance with the terms of his employment. Even if his directorship had been terminated by the action of Southern themselves, there would have been no breach by them of any express provision contained in the agreement. Nor would there have been any breach by the respondent of any express obligation on his part contained in the agreement had his directorship been brought to an end by his resignation under art. 89 (f).

However, the agreement by Southern to employ the respondent, or his agreement to serve them, could only take effect for the full 10 years if the respondent continued to be a director during that period. In these circumstances, there was, in my opinion, an implied engagement on the part of Southern that they would not during that period exercise their power of removing him from his directorship under art. 105, and an implied obligation on his part that he would not, during that period, serve notice of resignation under art. 89 (F). In *Stirling* v. *Maitland* (1), Cockburn, C.J., said, at p. 852:

> . . . if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. A

The principle so enunciated does not, however, warrant the implication in the present case of any further obligations on the part of Southern B and the respondent than those I have mentioned, for the principle is one which is founded upon good reason and good sense, and is, therefore, to be applied in any particular case only so far as, in the circumstances of the case, good reason and good sense may require. It would be impossible, for instance, to suppose that the respondent committed a C breach of an implied obligation under the agreement if he were to compound with his creditors, or be convicted of an indictable offence. It would be equally impossible to suppose that Southern committed a breach of any implied obligations if the respondent were made bankrupt on their petition, or if, before para. (D) of art. 89 was deleted in Jan., D 1936, Southern had enforced by sale any lien they might have held on the respondent's qualification shares. In my opinion, the only obligation on the part of Southern which the principle requires to be implied is an obligation to abstain from any act of which the direct object is to bring the respondent's directorship to an end, and not an E obligation to abstain from every act of which the cessation of the respondent's directorship may be the indirect and unintended consequence.

My Lords, for these reasons, I am of opinion that, when Southern exercised their statutory right of altering their articles of association, F they committed no breach of any implied obligation which they were under towards the respondent, even though one of the indirect and unintended consequences of the alteration was that the respondent was removed from his directorship. That his removal was both an indirect and unintended consequence of the alteration is plain. In G view of what has been called, though incorrectly, the merger of Southern and the other 9 companies, it was obviously convenient and in the best interests of Southern that all 10 companies should have identical articles of association. There was, therefore, nothing sinister about the adoption by Southern of the new articles. No one can suggest, H or, indeed, ever has suggested, that the adoption was made for the purpose of having the respondent removed, or that the possibility of such removal resulting from the adoption was ever in the contemplation of Southern. He was in fact removed, as we know, by the exercise by the appellants Federated Foundries, Ltd. (hereinafter referred to as

Foundries), of the general power over the directors of Southern conferred upon them by art. 8 of the new articles of association. The conferring of this power on Foundries, however, was no breach of any obligation they owed the respondent, as I have already pointed out, and I am wholly unable to see how it could become a breach by any subsequent exercise of the power by Foundries. Had Southern in any way instigated the subsequent exercise of the power by Foundries, their instigation could, no doubt, have been regarded as a breach of their implied obligation, but of any such instigation no trace is to be found. The removal of the respondent would appear to have been the spontaneous act of Foundries in the exercise of their free and unfettered discretion. Nor can Foundries be regarded as being in any way the agents of Southern in effecting the respondent's removal. It must be remembered in this connection that in the new articles of association Table A, art. 72, was not incorporated. There was, therefore, no article corresponding to art. 89 in the original articles. The result of this was that no director of Southern would vacate his office on the occurrence of any of the events specified in art. 89, and this, no doubt, was the reason for conferring upon Foundries, as being the beneficial owners of all the shares in Southern, the general power of removal of the Southern directors. Should one of them, for instance, become bankrupt, or of unsound mind, or be convicted of an indictable offence, he would nevertheless continue to be a director unless and until Foundries chose to remove him. Had one of these calamities befallen the respondent, and had Foundries removed him from his directorship, could it be said that Southern had committed a breach of their implied obligation ? Plainly not. This being so, however, the alleged breach of contract on their part is reduced to this—namely, that they omitted to insert in the new articles a provision that until Dec. 1, 1943, Foundries should not remove the respondent from his directorship for any reasons other than those specified in paras. (A) (B), (C), (E) and (F) of the old art. 89, and that this breach of contract on their part resulted in the respondent being damaged when Foundries removed him in Mar., 1937.

I have already given my reasons for thinking that Southern were under no implied obligation to make any such provision in the new articles. Their only implied obligation, so far as I can see, was not to remove him themselves except for one of the reasons specified in the old art. 89. The fact that, when they adopted the new articles of association, they took a step which indirectly, and without any intention on their part, made it possible for Foundries to remove him seems to me beside the mark. If a landowner agrees that he will himself do nothing on his land which may interfere with the light coming to the windows of his neighbour's house, he does not commit any breach of that agreement by selling his land to a third party who subsequently interferes with the light. Such interference would be merely an indirect and unintended result of the sale. For these reasons, I would allow the appeal.

LORD PORTER: My Lords, this is an appeal from a judgment of the Court of Appeal affirming a decision of HUMPHREYS, J., by a majority. The action out of which the appeal arises was brought by the respondent against the appellants, who are two companies incorporated under the Companies Acts. The first appellants were incorporated in 1926 as a private company with the object of carrying on the business of ironfounders. The second appellants were incorporated in Dec., 1935, with the object of bringing about the combination of 11 companies engaged in the foundry business, of which Southern was one. The desired result was attained through the acquisition by the Federated company of a controlling interest in the share capital of each of the 11 companies.

The respondent became a director of the Southern company in 1929. At that moment, one Sir Berkeley Sheffield was the holder of substantially the whole of the shares of the Southern company, and an agreement was entered into between him, the Southern company and the respondent under which the respondent was appointed managing director of the Southern company for the term of 10 years from Dec. 1, 1933. At the date of this appointment, the articles of association of the Southern company authorised the appointment of a managing director in the following terms. [His Lordship read the original articles set out above.]

After the Federated company was formed, each of the 11 companies whose shares were acquired by it adopted new articles of association in identical form. This action was taken by the Southern company at an extraordinary general meeting held on Apr. 17, 1936, at which the existing articles were revoked and new articles were adopted. At that time, the Federated company had already acquired all the shares of the Southern company except one, which was held by the respondent, but only as nominee of the Federated company. [His Lordship read the provisions of the new articles set out above.]

On Mar. 25, 1937, the board of directors of the Federated company passed a resolution removing the respondent from his office as a director of the Southern company, and an instrument in writing subscribed on behalf of the Federated company by 2 of its directors and its secretary was sent to the office of the Southern company, and was received by it on Mar. 27, 1937. Upon receipt of this document, the respondent admittedly ceased to be a director of the Southern company, and consequently ceased to be managing director. The respondent, however, contends that he was thereby wrongfully dismissed from his office as managing director by the Southern company, and that that company is liable to him in damages for breach of the agreement of Dec. 21, 1933. He also contends that the Federated company is liable to him in damages for procuring that breach. No question arises for the determination of your Lordships' House as to whether or not the latter claim is sustainable, since the appellants were content to treat the result of the action against the Southern company as binding also upon the Federated company, and in the remarks which follow I deal only with the right of action of the respondent against the Southern company. HUMPHREYS, J., before whom the action came in the first instance, decided in favour of the respondent, and in the Court of Appeal this decision was upheld by MACKINNON and GODDARD, L.JJ., SIR WILFRID A GREENE, M.R., dissenting.

Before dealing with the more difficult question whether the removal of the respondent from his position as director either by the Southern or by the Federated company constituted a breach of his contract of service as managing director, it is necessary to determine whether that B contract was itself, at the time at which it was made, one for 10 years certain, or was only for such period as the Southern company chose to retain him as a director. The same question might perhaps be put in another way—namely, to what extent was the respondent subject to the terms of arts. 89, 98 and 105 of the original articles. It is to be C observed that the contract provides for his engagement for 10 years without qualification, that art. 90 authorises the appointment of a managing director for such period as the directors think fit, and that art. 91 provides that, when so appointed, though he is not subject to art. 98, yet, unless his contract otherwise provides, he is subject to D removal under art. 105, and authorised to resign under art. 89 (F). I think that your Lordships are agreed that the contract does, however, otherwise provide. Clause 2 states that the respondent shall hold office for the term of 10 years. Clause 3 provides that throughout that term he shall devote the whole of his time to the business. Clause 4 fixes E his salary at a rate which increases until the fourth year is reached. Clauses 8 and 9 provide, in the event of the winding up of the company, except for certain purposes, for the respondent's dismissal and right to damages in terms which are more consistent with a fixed tenure of 10 years than with a contract terminable at the will of the company F or of the respondent. Clauses 11 and 12, which prohibit the setting up or joining a competing business and soliciting or dealing with customers of the Southern company, contain provisions which would be surprising in the case of a man whose office might rightfully be determined at any moment, more particularly as he is by cl. 12 prohibited from dealing G with or soliciting any person who has been a customer during 3 years before his appointment ends—a period which, if the company could get rid of him at any time, might long precede the beginning of the contract.

Apart from these considerations, however, it has to be borne in mind that Sir Berkeley Sheffield was also a party to the contract, and that H he not only undertook by cl. 13 to pay an extra sum for the respondent's living expenses and the cost of his removal to London up to 12 months after the date of the contract, but also entered into an arrangement with the respondent as to the subscription for, and the non-transference of, preference shares in another company so long as the obligations of the respondent under the contract were duly and punctually performed.

In my view, therefore, the terms of the contract lead to the conclusion that it is one for 10 years, and is not subject to the provisions of arts. 89 (F), 98 and 105. Having regard to the provisions of arts. 90 and 91, it could not be, and was not, contended that such an appointment was *ultra vires*.

A The application of the rest of the terms of art. 89 to a managing director is somewhat different. The true view may well be that, in the case of the happening of any of the events foreshadowed in (A) to (D), the respondent would cease to be a director, and, therefore, a managing director. The same is, I think, true in the case of art. 89 (E), but, as a similar provision is contained in cl. 3 of the contract, its materiality B is not great. In none of these events, however, would either party be liable to an action for breach of contract, and this result follows whether one regards the contract as incorporating the articles, save where its terms are inconsistent with them, or whether the termination of the directorship in such cases is regarded as not being due to the intervention C of either party. However this may be, in my view, unless the articles were altered, the company, except in certain specified cases, could not dismiss the respondent nor the respondent leave the company for 10 years without being liable to be sued for breach of contract. This was, in my view, the position when the contract was entered into. D What, then, was the effect of the arrangement with the Federated company and the alteration of the articles ?

It is common ground, and, indeed, long-established law, that a company cannot forgo its right to alter its articles, but it does not follow that the alteration may not be, or result in, a breach of contract. E The principle is perhaps most clearly enunciated, first, in *Allen* v. *Gold Reefs of West Africa, Ltd.* (3), a case in which a company was held entitled to alter its articles so as to obtain a lien on fully paid shares, though before the alteration it had a lien only upon partially paid shares. LINDLEY, M.R., states the position thus, at pp. 673, 674 : F

> A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered. . . . It is easy to imagine cases in which even a member of a company may acquire by contract or otherwise special rights against the company, which G exclude him from the operation of a subsequently altered article.

The principle was also clearly enunciated in *Baily* v. *British Equitable Assurance Co.* (4), in which a participating policyholder had taken out a policy which the Court of Appeal thought entitled him to have the whole of the profits distributed, and he was held entitled to a declaration H that the assurance company ought to distribute the whole of such profits. The action was necessitated because the company, which, when the policy was taken out, had been formed, and was operating, under a deed of settlement providing for the distribution of the whole of the profits, at a later date proposed to register itself with limited liability, to substitute a memorandum and articles for the deed of settlement, and, under the terms of the articles, to carry part of the profits to a reserve fund. The Court of Appeal affirmed a declaration by KEKEWICH, J., that the company ought to continue to distribute the entire profits arising from the participating branch of its business, and A COZENS HARDY, M.R., said, at p. 385:

> But the case of a contract between an outsider and the company is entirely different, and even a shareholder must be regarded as an outsider in so far as he contracts with the company otherwise than in respect of his shares. It would be dangerous to hold that in a contract of . . . service . . . validly entered into by a company there is any greater power of variation of the rights and liabilities of the B parties than would exist if, instead of the company, the contracting party had been an individual.

The general principle, therefore, may, I think, be stated thus. (i) A company cannot be precluded from altering its articles thereby giving itself power to act upon the provisions of the altered articles, but so C to act may nevertheless be a breach of contract if it is contrary to a stipulation in a contract validly made before the alteration. (ii) Nor can an injunction be granted to prevent the adoption of the new articles. In that sense, they are binding on all and sundry, but for the company to act upon them will none the less render it liable D in damages if such action is contrary to the previous engagements of the company. If, therefore, the altered articles had provided for the dismissal without notice of a managing director previously appointed, the dismissal would be *intra vires* the company, but would nevertheless expose the company to an action for damages if the appointment had E been for a term of (say) 10 years and he were dismissed in less. Once it is established that the appointment is for a time certain and the dismissal before its termination, the result follows, and I do not understand the appellants to contend to the contrary. The complication lies in the facts (i) that the respondent has been dismissed, not from F his office of managing director, but has been removed from his position of director, and (ii) that the removal has been effected, not by the Southern company, but by the Federated company. So far as the first matter is concerned, the decision must, I think, be reached by applying the well-known principle laid down by COCKBURN, C.J., in G *Stirling* v. *Maitland* (1), at p. 852:

> I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that H the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue. The transfer of business and the dissolution of the company was certainly the act of the company itself, so that they have by their act put an end to the state of things under which alone this covenant would operate.

If, therefore, the Southern company had altered their articles in such a way as to enable them to remove the respondent from his directorship at will, and had so removed him, I, in common, I believe, with all your Lordships, would regard their action as coming under the *dictum* of Cockburn, C.J., as an actionable breach of contract.

In reaching this conclusion I find myself unable to accept the dissenting judgment of Sir Wilfrid Greene, M.R., who took the view that under the contract the plaintiff was expressly appointed managing director, not A for 10 years, but only for such a period not exceeding 10 years as he remained a director, and that no term could be implied which would prevent the company from terminating the respondent's directorship, with the result that he ceased to be capable of retaining his position as managing director. B

However, no such alteration was made. The new articles did away with all former grounds of removal and termination of the director's office, and left it to the Federated company at their absolute discretion to keep or remove a director of the Southern company. That change, it is said, is no breach, or, at any rate, is not contended to be a breach, C of the respondent's contract, and his later removal is the act of Federated, and not of the Southern company, and one, therefore, for which the latter company is not responsible. This contention was negatived by Sir Wilfrid Greene, M.R., as well as the other two members of the Court of Appeal. As, however, the main argument appears to have been D grounded upon the question of the true construction of the contract, the matter now under consideration was treated as subsidiary, with the consequence that it was dealt with very shortly in the Court of Appeal.

I cannot say that I have found the solution an easy one, and obviously, having regard to the divergence of view in your Lordships' House, the E matter is one which lends itself to a conflict of opinion. Some support for the appellants' contention was sought in *Bluett* v. *Stutchbury's, Ltd.* (12). The case is very shortly reported, and the exact grounds of the decision are not easy to ascertain, but they lend some countenance to the appellants' argument, inasmuch as in that case, as in this, the articles F had been altered so that the retention or dismissal of the director from his directorship was left to the determination of a third party. Cozens Hardy, M.R., is reported to have said that, in such circumstances, if the third party deprived the managing director of his directorship, and he necessarily ceased to be managing director, the company could not G prevent that action, and were in no sense the authors of the dismissal.

If the true view be that the only action taken by the company was the alteration of the articles, and if, indeed, thereafter they were in no way implicated in the act of the Federated company in removing the respondent, and could not help themselves, then the appeal must H succeed. However, though it is true that ultimately the Southern company could not prevent the Federated company from removing the respondent from his directorship, the act of removal is not, I think, solely the act of the Federated company. Rather it is the combined act of both, an act impossible to the latter but for the act of the former, and not resulting in a breach of contract until the power of dismissal given by the former was acted upon by the latter. To say that the Southern company could have helped themselves if they removed the respondent from his directorship, but could not do so where they authorised the removal by another, would seem to me to treat what is at best a technicality as if it were the substance of the case. It is the Southern company's act which has resulted in the respondent's removal, and none the less so though his dismissal required two acts, and not one, for its accomplishment. I would affirm the judgment of the Court of Appeal.

Appeal dismissed with costs.

Solicitors: *Allen & Overy* (for the appellants); *Slaughter & May* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

HARLING *v.* CELYNEN COLLIERIES WORKMEN'S INSTITUTE.

[KING'S BENCH DIVISION (Lawrence, J.), **January 11, March 20, 1940.**]

Income Tax—Deductions against profits—Loss—Carrying forward of loss—"Six following years of assessment"—Finance Act, 1926 (*c.* 22), *s.* 33 (1).

The respondents sustained a loss in the year ending Dec. 31, 1930, which formed the basis of assessment for the year Apr. 5, 1931, to Apr. 5, 1932, and sought relief under the Finance Act, 1926, s. 33, by carrying forward and deducting the unexhausted balance of this loss from the profits in the year of assessment 1937-38. The inspector of taxes contended that, as, under the section, relief was allowable "as far as may be" for the 6 years following the year of loss, but no further, no part of this loss could be carried forward and deducted from profits after the year 1936-37:—

HELD: upon the proper construction of the Finance Act, 1926, s. 33 (1), the words "the 6 following years of assessment" did not include the year in which the loss formed the basis of assessment, and the respondents were, therefore, entitled to deduct the balance of this loss from the profits for the year 1937-38.

[EDITORIAL NOTE. The Finance Act, 1926, s. 33 (1), allows the carrying forward of losses for the 6 following years of assessment. The only question here is the construction of the phrase "for the 6 following years of assessment," with particular reference to the last year in which it is possible to set off a loss so carried forward.

AS TO CARRYING FORWARD OF LOSS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 332, 333, paras. 666, 667; and FOR CASES, see DIGEST, Vol. 28, pp. 46, 47, Nos. 233-236.]

Case referred to:

(1) *Inland Revenue* v. *Adamson*, [1933] S.C. 23; Digest Supp.; 17 Tax Cas. 679.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for General Purposes of the Income Tax for the division of Bedwellty in the county of Monmouth for the opinion of the High Court of Justice. The respondents appealed to the commissioners against an assessment made on them under the Income Tax Act, 1918, Sched. D, in respect of profits from a cinema and dance-hall of £451 for the year ending Apr. 5, 1938, less a loss brought forward of £28, being the loss shown by the accounts for the year ending Dec. 31, 1933. They claimed relief under the Finance Act, 1926, s. 33, in respect of the unexhausted balance of a loss of £1,639 incurred and shown by the accounts for the year ending Dec. 31, 1930. The amount of the unexhausted balance of the loss of £1,639 not allowed up to the year of assessment 1936-37 amounted to £426. The question at issue was as to whether the expression "the 6 following years of assessment" in sect. 33 included the year of assessment 1937-38.

It was contended on behalf of the respondents:

(*a*) That under the Finance Act, 1926, s. 33, they were entitled to set off the unexhausted balance of the loss of £1,639 incurred in and shown by the accounts for the year ended Dec. 31, 1930, against the assessment of £451 together with £25 of the £28 loss incurred in the year ended Dec. 31, 1933, and, therefore, to have the net assessment reduced to "Nil"; (*b*) that the expression "the 6 following years of assessment" in the Finance Act, 1926, s. 33, as applied to the right to set off the loss of £1,639, must include the year of assessment 1937-38, because there was not, and could not be, an assessment for the year 1931-32; (*c*) that *Inland Revenue* v. *Adamson* (1) and the *dictum* therein of LORD MORISON had no application to the case under consideration, the respondents being an old-established concern, and not a new business.

On behalf of the inspector of taxes, it was contended as follows:

(*a*) That sect. 33 referred to an actual loss sustained in any year, and not to a statutory loss computed by reference to the loss actually sustained in a preceding year; (*b*) that relief was allowable "as far as may be" against the assessments for the 6 years immediately following the year of loss, but no further; (*c*) that, in this particular case, it happened that the assessment for the year 1931-32, which was the year immediately following the year of loss, was "Nil," and, therefore, the set-off under sect. 33 was "Nil." The year 1931-32 was, however, the first year subsequent to 1930, and it therefore followed that the year 1936-37 was the sixth and final year of assessment for which relief in respect of the unexhausted balance of the loss of £1,639 could be allowed; (*d*) that *Inland Revenue* v. *Adamson* (1) and the *dictum* therein of LORD MORISON clearly showed that sect. 33 referred to an actual loss.

The commissioners, having considered the facts and arguments submitted to them, were of opinion that the balance of the loss incurred in 1930 was allowable as far as might be against the assessment for the year 1937-38 under the Finance Act, 1926, s. 33. The assessment was, therefore, amended to £451, less losses brought forward £451.

The Finance Act, 1926, s. 33 (1), provides as follows:

> Where a person has in any trade, profession or vocation carried on by him, either solely or in partnership, sustained a loss (to be computed in like manner as profits or gains under the rules applicable to Sched. D, Cases I and II) in respect of which relief has not been wholly given under the Income Tax Act, 1918, s. 34 (which relates to relief in respect of certain losses), or under Sched. D, Cases I and II, r. 13 (which provides for the setting-off of losses against profits or gains in a distinct trade), or under any other provision of the Income Tax Acts, he may claim that any portion of the loss for which relief has not been so given shall be carried forward and, as far as may be, deducted from or set-off against the amount of profits or gains on which he is assessed under Sched. D in respect of that trade, profession or vocation for the 6 following years of assessment: Provided that in so far as relief in respect of any loss has been given to any person under this section that person shall not

be entitled to claim relief in respect of that loss under any other provision of the Income Tax Acts.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the appellant.

Frederick Grant for the respondents.

LAWRENCE, J.: The question in this case is as to the meaning of the words "the 6 following years of assessment" in the Finance Act, 1926, s. 33 (1). Do the 6 years of assessment include the year in which the loss forms the basis of assessment? The respondents contend that, as in the year of assessment which follows the year in which the loss was incurred no deduction can be made, it cannot have been the intention of the legislature to count that year in the 6 years. In the present case, the taxpayer sustained a loss in the year ending Dec. 31, 1930, which formed the basis of assessment for the year Apr. 5, 1931, to Apr. 5, 1932, and the revenue authorities contend that no part of this loss can be carried forward and deducted from profits after the year Apr. 5, 1936, to Apr. 5, 1937, whilst the respondents contend, and the commissioners have held, that the loss can be carried forward and deducted from the profits of the year of assessment Apr. 5, 1937, to Apr. 5, 1938. I have come to the conclusion that the decision of the commissioners is correct. The section provides that the loss shall be carried forward, and, as far as may be, deducted from the profits for the 6 following years, and, in my opinion, it cannot be said that the loss is carried forward, and, as far as may be, deducted, in the year in which the loss forms the basis of assessment. It cannot, I think, fairly be said that a loss may be carried forward and deducted in a year in which it can neither be deducted nor have any effect. The words "as far as may be" are perfectly intelligible in after years, because, of course, in any of the 6 following years there may be no profits from which to deduct the loss, but, in the year in which the loss itself is the basis of assessment, there cannot be any profits to deduct from, and to use the words "as far as may be" as applying to that year seems to me ironical and unnatural. The appeal will, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Collyer-Bristow & Co.*, agents for *D. Granville West*, Newbridge (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

BRANDON *v.* REIDY.

[COURT OF APPEAL (Slesser, Scott and Goddard, L.JJ.), **April 23, 24, 1940.**]

Emergency Legislation—Execution on judgment—Discretion of court—Order for possession—Landlord liable to pay £350 per annum under head lease—Tenant's interest mortgaged—Mortgage supported by life policy—Mortgagee not party to application—Whether any provision made for payment to mortgagee—" Unable immediately to do so "—Whether tenant must show ultimate ability to pay—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (4). A

A landlord obtained judgment against his tenant for possession, one quarter's rent and mesne profits. The premises were a house in Harley Street upon which the defendant, a doctor, had spent £7,000 in making it suitable for letting as doctors' consulting rooms. To provide that £7,000 the defendant had mortgaged his sublease of the premises to an insurance company, and, as further security, had taken out with them an endowment policy on his life at a premium of £320 per annum. The landlord was paying a rent of £350 per annum under the head lease, and the tenant had to pay a rent of £500 per annum under his sublease. Just before the outbreak of war, the whole of the premises was let, and the defendant was in a position to meet his liabilities in respect of the premises. Owing to the war, the greater part of the premises had become vacant. An order had been made under the Courts (Emergency Powers) Act, 1939, ordering that the judgment for possession should be stayed so long as £10 per month was paid by the defendant. It was shown that the defendant had a sum of about £340 per annum available to meet his liabilities in respect of the premises :— B C D

HELD : (i) the words in the Courts (Emergency Powers) Act, 1939, s. 1 (4), " is unable immediately to do so by reason of circumstances directly or indirectly attributable to " the war do not place upon the defendant the necessity of proving that he will be able to pay the full amount at some later date. E

(ii) as the mortgagees were not parties to the application, no provision could be made for payment of their interest and the premium on the life policy, but the whole £340 must be made available for the landlord.

[EDITORIAL NOTE. This case raises two new points under the Courts (Emergency Powers) Act, 1939. The first is whether the introduction of the word " immediately" has placed upon the defendant the burden of proving that he would at some future time be able to meet the whole of his liability. It was said that the fact that he was unable " immediately " to liquidate the claim implied that he would at some future time be able to do so in full. The second point is that the court need consider only those parties who are before it. In the present case, the mortgagees of the tenant's interest were obviously more interested in this application than other unsecured creditors of the same debtor would be ; but the court has ordered the payment to the landlord to be increased to the full amount of the sum shown to be available, leaving no part of that sum to be applied to the payment of the mortgagees' interest or of the premiums due under the insurance policy. F G

AS TO LEAVE TO ISSUE EXECUTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13 ; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.] H

Case referred to :

(1) *A.* v. *B.*, [1940] 1 K.B. 217 ; [1939] 4 All E.R. 169 ; Digest Supp. ; 161 L.T. 325.

INTERLOCUTORY APPEAL by the plaintiff from an order made in chambers by OLIVER, J., on Apr. 12, 1940. The facts are fully set out

in the judgment of the court delivered by Goddard, L.J. The judge
in chambers affirmed the order of the master.

R. T. Paget for the appellant.

B. L. A. O'Malley for the respondent.

Paget: The Act is an Act of moratorium, not an Act of oblivion.
A It was passed to assist those debtors who might be able to pay their debts
if they were given time, not those who could never hope to pay. The
word "immediately" in subsect. (4) must be construed as it would be
construed in a letter from a debtor in which he said: "I am not able
immediately to pay." That is to say, it must be construed as meaning
B temporarily unable to pay. By the alternative construction, the word
"immediately" is meaningless. This is unlikely, since in subsect. (5),
where bankruptcy is dealt with, the word "immediately" is omitted.
Landlords and judgment creditors, therefore, are to be kept from their
remedy only in those cases in which time will be of assistance to the
C tenant or debtor, but the tenant or debtor is in all cases to be protected
where the penal provisions of the bankruptcy law come into consideration.
The judge was wrong in principle when he said that he could not look
to the interests of creditors among themselves. The debtor's ability
to pay depends upon the relations of his creditors. The tenant here
D is capable of paying £340 per annum in respect of this house, and
that £340 should be paid to the landlord, as the priority creditor, in
preference to the mortgagee of the leasehold, who is a postponed creditor.

O'Malley: The insurance company not being before the court, there
is nothing to show what their position in the case is. It is not
E just to increase the amount of the mesne profits payable, for then the
debtor, having only £340 per annum available, will be unable to pay
the mortgagees, and, if he failed to do so, they would take possession.
Then the £7,000 which the debtor has expended on the premises will
be lost to him, and one of the mischiefs which the Act was designed to
F prevent—the ejection from his place of business of a citizen unable to
pay his debts—would befall. Admittedly, under the master's order,
the plaintiff would have to continue paying £350 per annum to the
superior landlords, while he was receiving only £120 from the defendant.
On the other hand, as soon as the war finishes, the order will come to
G an end, and then, if the debtor fails to pay all arrears, the plaintiff will
have the full benefit of the £7,000 expended in improvements.

Goddard, L.J. [delivering the judgment of the court]: This is
an appeal from an order of Oliver, J., in chambers who affirmed the
H order of Master Horridge made on an application by the plaintiff
in the action for leave to proceed to enforce judgment in which he
stayed the execution under the Act so long as £10 per month was paid
by the defendant, the first payment to be made on Apr. 27, 1940. The
action is by a landlord against a tenant, a young surgeon just hoping
to start in practice when the war broke out and now serving his country.

The landlord claimed possession of the premises, No. 148, Harley Street, one quarter's rent and mesne profits from Sept. 29. The action was undefended, and judgment was obtained for possession and for a quarter's rent, and for mesne profits at the rate claimed—namely, £41 13*s.* 4*d.*

The main question in the proceedings under the Courts (Emergency Powers) Act, 1939, was whether or not the plaintiff was to have liberty to enforce his judgment for possession. It is only right and fair to the defendant to say that, after the judgment, he paid the quarter's rent due on Sept. 29, for which judgment had been obtained. The case is one of very great misfortune for all parties and the greatest possible sympathy can properly be felt for the defendant. The head landlords are the Commissioners of Crown Lands. The plaintiff, who is their tenant, has to pay them £350 per annum, and, though this is not very material, he had to pay some premium for the lease. The sublease to the defendant reserves a rent of £500 per annum. When the defendant was just about to qualify, he thought that it would be a good investment, as no doubt it would have been, to take this house, reconstruct it and redecorate it, spend a considerable amount of money on it and have his own consulting rooms there. I do not know whether he intended himself to live there, but that does not matter. He intended to carry on his practice there, and to let various other rooms as consulting rooms to other doctors. He arranged that satisfactorily, but, to enable him to do it, he had to borrow £4,000 from the Equity & Law Life Assurance Society on mortgage, at 6 per cent. interest, reducible to 5½ per cent., and, in addition to that, he had to take out an endowment policy on his life, for which he had to pay the not inconsiderable premium of something over £320 per annum. In addition to that, the defendant has other debts, largely family debts. His financial position was not very hopeful, but, at the time when war broke out, he had succeeded in letting these consulting rooms to various doctors, and was apparently making the place pay, or, at any rate, was running it without loss. When the war broke out, most of the doctors left their consulting rooms and took commissions in the Services, where the pay is not equivalent to what a doctor in Harley Street can usually make. Some of these doctors who were the defendant's tenants have not been able to pay their rents to him, and he is left with the place on his hands now, with some tenants, but, as we gather, running at a loss.

The question is, what is to be done? The defendant, not unnaturally, takes up this position. He says: "I have spent a great deal of money on this house. I have incurred a debt of £4,000 to the Equity & Law Life Assurance Society on mortgage. I have put in other moneys of my own, and, if this lease goes, I suffer a very severe loss." On the other hand, the landlord says: "I am paying out of my pocket at the present moment £350 per annum as rent, and what you are asking me to do means that I should be content with receiving only £120 per annum. I am having to pay £230 per annum out of my own pocket for the benefit of the tenant and the benefit of the Equity & Law Life Assurance Society."

The first point counsel for the appellant took in his argument was this. He said that this is not a case in which the court can exercise its jurisdiction under the Courts (Emergency Powers) Act, 1939, because A sect. 1 (4) of that Act is as follows:

> If . . . the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefore B subject to such restrictions and conditions as the court thinks proper.

The argument of counsel for the appellant was that this is an Act intended to provide a moratorium and not a release of people from their obligations for all time, and that the presence of the word "immediately" in the section shows that what Parliament was C contemplating was the case of a man who cannot at the moment pay, but will be able to in the future. He argues that the position which is shown here is such that it is hopeless to suppose that the defendant will be able to pay in the future, and that the court, therefore, has no jurisdiction to give relief. This court is not prepared to take such a narrow D view of the section as that, or to construe "immediately" in the way that that argument would invite us to do. Were we to give such a narrow construction as that to the Act, it would very seriously circumscribe the beneficial object which the Act has in mind. We think that the presence of the word "immediately" results in no more than this. E If the debtor shows that he cannot pay at the time when the judgment is obtained against him, then he can come to the court and ask for relief, and, while the court can take into account a great many matters, as was shown in the case of *A.* v. *B.* (1) recently before this court, it is not incumbent upon the debtor to show that at any particular time, or, F indeed, at any time, he will be able to pay. The court must exercise its discretion in the best way it can, bearing in mind that it is always open to either party to go back to the court and ask for a review of the circumstances and a new order to pay.

The position with regard to the defendant's present financial position G is this. It seems to be agreed on all hands that he has a sum of about £340 per annum available, provided that matters remain in their present state, that such doctors as are left in the consulting rooms pay their rents, and that the outgoings and expenses go no higher. Counsel for the defendant has argued that the £340 ought to be utilised partly in H paying the landlord and partly in paying the mortgagees, who are the Equity & Law Life Assurance Society.

It is to be observed that the mortgagees are not before the court, and the court think that the attention of the rule-making authority under this Act might perhaps be called to this particular case, where there are really three persons interested. We do not mean to suggest that, in every case where a debtor asks for relief and says he owes money to A, B, C, D, E and F, in addition to the plaintiff, all those people should be brought before the court, but, in a case such as this, where there is a mortgage of a lease, and where the three people vitally interested in the matter are the landlord, the tenant and the mortgagees, it might be well that the court in a proper case should be able to have the mortgagees before them. A An attempt has to be made to do what SCOTT, L.J., has called a certain amount of distributive justice, and distribute between the various people what the debtor may be able to pay. Of course, in the present case, if the landlord could get nothing, it would not be right that he should be kept at bay entirely while the mortgagees were getting B everything. On the other hand, one can see quite well that, so far as the debtor is concerned, he is vitally interested in the attitude which the mortgagees may take up, and we have no certain knowledge as to that. Of course, if they do not get paid either the premium on the policy or the interest on the mortgage, they may take proceedings which may have C to come before the court later.

The question with which we are concerned is whether or not the defendant should be given relief in this case. That is to say, should he be allowed to keep this house, paying only £120 per annum off a rental of £500 per annum? D We do not think that it is right. If there is £340 per annum now available, it seems to the court that the person who ought to have that money is the landlord, who has to pay £350 per annum, practically the same amount, as rent to the Commissioners of Crown Lands, or be liable to a forfeiture. We cannot think that it is right, considering that the landlord has no interest in the mortgage whatever, E that the court by its order should, in substance, order the landlord to pay out of his pocket £230 per annum—for that is what it comes to—to keep alive this lease for the benefit of the tenant and the mortgagees. We think, therefore, that the proper order to make is that the appeal should be allowed, F and the order should be varied by increasing the amount to be paid under the order to the sum of £28 6*s*. 8*d*. per month from the date of the next payment, which is Apr. 27. Counsel for the plaintiff has been instructed not to ask that the payment made in March should be increased, and that is, we think, a generous attitude for the landlord to adopt. G

The court thinks it right to say that, in making this order, we are dealing with the matter only as it is immediately before us now. It does not prevent either party from going back to the court under the Courts (Emergency Powers) Rules, 1939, r. 18, asking for a variation of the order. H It does not follow that circumstances may not arise which would justify the court in reducing that order. Equally, it does not follow that in time the court may not say: "You cannot be allowed to go on occupying this house without paying a proper rent for it, and simply to pile up debt to be liquidated hereafter." We express no opinion as to what order is to be, or can be, made hereafter. All we are dealing with is the matter which is immediately before us, and all we do is to vary the judge's order which he made in chambers by increasing the sum to be paid per month from £10 to £28 6*s*. 8*d*.

Solicitors: *L. A. Hart* (for the appellant); *Ballantyne, Clifford & Co.* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

TRUE *v.* AMALGAMATED COLLIERIES OF W. A., LTD.

[PRIVY COUNCIL (Viscount Caldecote, L.C., Viscount Sankey, Lord Thankerton, Lord Russell of Killowen and Lord Roche), **March 5, 7, 8, April 5, 1940.**]

Privy Council—Australia—Master and servant—Industrial award or agreement—Period of limitation of action—Industrial Arbitration Act (Western Australia), 1912-35, *s.* 176.

The Industrial Arbitration Act (Western Australia), 1912-35, s. 176, enacts that no person is entitled to contract out of an industrial award or agreement, and that the worker shall be entitled to payment at the rate prescribed by such award or agreement, and to enforce such payment by action, subject to the limitation that such action must be commenced within 12 months of the time when the cause of action arose. The appellant entered into a contract of service under which he was to be paid wages at the appropriate rates under an award affecting his particular employment. He worked for one year. He complained that his wages had been wrongly calculated under the award, and some six months after the determination of the employment he commenced an action to recover the amount which he contended he had been underpaid during the year he was working:—

HELD: the claim in these circumstances was one under the contract of service and the time limit under the above section did not apply. That time limit applied only to a statutory claim based on the award and, at the same time, inconsistent with the terms of the contract of service.

[EDITORIAL NOTE. Though there is here only a question of construction, the case is one of general importance. A special limitation must be confined to the particular claims to which the statute applies it, and here, when the facts are properly understood, it will be seen that the workman was claiming under his contract, and not enforcing a statutory right. Some complication arises from the fact that the contract provided for wages to be paid at the rates settled by the award, but it is for that reason that, though the man is asking to be paid the prescribed rates, yet his claim is under his contract which gives him that right, and not under the statute.

AS TO SPECIAL PERIODS OF LIMITATIONS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 774-777, paras. 1065-1073; and FOR CASES, see DIGEST, Vol. 32, pp. 531, 532.]

APPEAL from an order, dated April 4, 1938, of the High Court of Australia (LATHAM, C.J., STARKE, DIXON, EVATT and MCTIERNAN, JJ.), varying an order, dated Oct. 29, 1937, of the Supreme Court of Western Australia (NORTHMORE, C.J., and DWYER, J.).

The relevant facts may be stated shortly as follows. The appellant was employed under a contract of employment which provided for remuneration under the appropriate award. His claim was for the sum by which he had been underpaid, alleging that he had not been paid the full wages due to him under the award—which, of course, were also those due to him under his contract of service, since that provided for payment to be made to him in accordance with the rates prescribed by the award. The plaintiff was, therefore, suing upon his contract of service, and not for a greater sum than that there provided for, which, by statute, he might be entitled to claim.

D. Ll. Jenkins, K.C., and *J. H. Stamp* for the appellant.

D. N. Pritt, K.C., and *Victor Wolff* (for *C. M. Cahn*, on war service) for the respondent company.

LORD RUSSELL OF KILLOWEN: The question for decision on this appeal is whether the appellant's action is to any extent time-barred under the Industrial Arbitration Act (Western Australia), 1912-35, s. 176 (2), and the answer depends upon the true construction of that section. The Act establishes a Court of Arbitration with jurisdiction to deal with and determine all industrial matters, including power to make awards, each of which while in force operates (sect. 83) "as a common rule of any industry to which it applies." The court's authority may be delegated to an industrial board. At the dates relevant to this appeal, there was in force, as regards the parties to this appeal, an award (No. 32 of 1934), being an award (No. 10 of 1931) made by the Industrial Board as amended in Aug., 1934, by the Court of Arbitration. The admitted facts show that the appellant was verbally engaged by the respondents to work for them as a miner at tonnage rates, and not at day wages, upon the terms and conditions of the award No. 32 of 1934. His contract of service, therefore, contained, as part thereof, all the relevant provisions of that award, including the appropriate provisions as to wages. Pursuant to that engagement, the appellant worked for the respondents for one year, ending on Sept. 26, 1936, and was paid wages which are alleged by him to be insufficient, under the terms of his contract of service, by an amount of £8 1*s*. 9*d*. On Apr. 12, 1937, he commenced proceedings by summons in the local court at Collie, Western Australia, claiming payment of that sum. The respondents raised two defences, one which, if successful, would defeat the whole claim, the other being that, as to £4 12*s*. 11*d*., the claim was time-barred under sect. 176 (2) of the Act. In the local court, the magistrate acceded to the first defence, and entered judgment for the respondents. On appeal, the Full Court of the Supreme Court of Western Australia (NORTHMORE, C.J., and DWYER, J.) set aside that judgment, and entered judgment for the appellant for the full amount of £8 1*s*. 9*d*. The respondents then appealed to the High Court of Australia, with the result that, by order of that court dated Apr. 4, 1938, the order of the Supreme Court was varied by substituting the sum of £3 8*s*. 10*d*. for the sum of £8 1*s*. 9*d*. All the judges in the High Court were in agreement in rejecting the first ground of defence, but LATHAM, C.J., and STARKE and DIXON, JJ., were of opinion that, as to £4 12*s*. 11*d*., the action was time-barred under the section, while EVATT and McTIERNAN, JJ., were of opinion that the section did not apply. The action is a test action, and, by order in council, leave was given to the appellant to appeal to His Majesty in Council. There is no appeal from the decision of the High Court in regard to the first ground of defence. The only question for their Lordships' consideration is whether the appellant's claim is, as to £4 12*s.* 11*d.*, time-barred under sect. 176. That section provides as follows:

> (1) Subject to sect. 39 no person shall be freed or discharged from any liability or penalty or from the obligation of any industrial award or agreement by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award or agreement, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled. (2) Every worker shall be entitled to be paid by his employer in accordance with any industrial agreement or award binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within 12 months from the time when the cause of action arose.

In the judgments in the High Court, and in the course of the argument before the Board, decisions were cited upon other and different enactments by other legislatures, but, having considered those authorities with care, their Lordships have found that they afford no real assistance or guide in answering the question which arises on this appeal. The section, they think, must be construed upon a consideration of the language used, and of the Act in which it finds a place. The Supreme Court appear to have thought the position reasonably plain. They held that the subsection applied only where the workman could not, under the provisions of his contract, obtain the full amount of wage fixed by the award, but was forced to have recourse to the subsection in order to obtain the difference between his contract wage and the amount fixed by the award, and that, since the appellant sued on his contract alone, he had no need to pray the subsection in aid, and was not, therefore, subject to the subsection's time-bar. The majority in the High Court thought that, in every case in which a worker was seeking to recover wages of an amount which was fixed by an award, he was (whether or not entitled to it by the provisions of his contract) seeking to recover an amount to which sect. 176 declared him to be entitled, and that, accordingly, the 12-months' limitation applied. On the other hand, EVATT and McTIERNAN, JJ., took the same view of the section as that adopted by the Supreme Court. They were of opinion that, as the appellant was entitled to his wages under his contract, he had no need to assert the right given by the section, and was not, therefore, bound by the limitation therein contained.

In view of this conflict of eminent judicial opinion, the question obviously cannot be said to be plain or easy of solution, but, on consideration, their Lordships find themselves in agreement with the views of EVATT and McTIERNAN, JJ., and the Supreme Court. The section is, in their

opinion, a section dealing with a particular subject-matter—namely, contracting out. That is, it deals with contracts of service which are inconsistent with industrial agreements or awards. Subsect. (1) annuls any provision in a contract of service inconsistent with an industrial award or agreement. If one of the offending provisions should be the provision as to wages, a difficult situation for the servant might arise. A
There might be a difficulty in suing on a *quantum meruit*, or on an implied promise to pay the amount fixed by the industrial award or agreement, in view of the fact that the parties had *de facto* purported to stipulate for a specified and a different sum. Subsect. (2) meets and overcomes this difficulty by declaring that, notwithstanding the contract, or pretended B
contract, to the contrary, the worker shall be entitled to be paid in accordance with the industrial agreement or award, and may recover the amount to which by the subsection he is declared entitled "as wages," but subject to the short period of limitation. In other words, subsect. (2) presupposes the existence of a contract of employment which, C
as to its wages provision, is inconsistent with an industrial agreement or award, and deals with such a case by giving the workman a statutory right to recover "as wages" the amount fixed by the industrial agreement or award, as the case may be. It is that statutory right alone which is subject to the time-bar of 12 months. If he claims against the terms of D
his contract, he is given the shortened time limit, but the time within which he may sue to enforce the terms of his contract is not affected.

Their Lordships think that this construction is the only one which gives due effect to all the words of the section. The effect of the rival view would be to reduce the normal period of limitation from 6 years to E
12 months in the case of every worker to whom an industrial agreement or award applies—an enormous industrial field, even if one were to except, as DIXON, J., does, the cases in which the contract wage exceeds the amount fixed by the industrial agreement or award. It would be strange to find so drastic and sweeping a change in the laws of limitation in a F
contracting-out provision, or enacted otherwise than in the clearest possible terms. The subsection, if that had been intended, need only have provided that every worker to whom an industrial agreement or award applied might recover wages in accordance therewith, but that every action for the recovery of wages the amount of which was in G
fact fixed by an industrial agreement or award must be commenced within 12 months from the time when the cause of action arose.

On the other hand, the construction which their Lordships prefer to adopt assigns an operation and effect to every word in the subsection. It attributes to the words "such worker" a qualifying meaning which H
narrows the general expression "every worker" by limiting it to a worker whose contract, or pretended contract, is "to the contrary." It attributes to the words "as wages" the meaning that the workman may recover as if payable under a contract of service money due as a statutory right. It attributes to the words "is hereby declared entitled" the meaning

that a new right is being conferred by the subsection. It attributes to the words " such amount " the meaning of the amount which the worker is so given the right to recover as wages. For the reasons indicated, their Lordships are of opinion that the appeal should be allowed, the order of the High Court discharged except as to costs, and the order of the Supreme Court restored. They will humbly advise His Majesty accordingly. The respondent will pay the costs of this appeal.

Appeal allowed with costs.

Solicitors: *Blyth, Dutton, Hartley & Blyth* (for the appellant); *M. L. Moss & Son* (for the respondent).

[*Reported by* CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

HEYWOOD & BRYETT, LTD. *v.* A. HEYWOOD & SON.

[COURT OF APPEAL (Slesser, Scott and Luxmoore, L.JJ.), **April 22, 1940.**]

Workmen's Compensation—Indemnity—Contractor and subcontractor—Whether negligence of contractor answer to claim for indemnity—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 6.

The applicants were builders who employed subcontractors. A servant of the subcontractors was injured, and was entitled to workmen's compensation. This was paid by the applicants, who sought to be indemnified in respect thereof by the subcontractors. It was contended that the right to indemnity could be defeated by showing that the applicants were guilty of negligence which caused the accident, or, alternatively, that the accident was due to a breach of statutory duty by the applicants:—

HELD: the right to indemnity was absolute, as the Workmen's Compensation Act, 1925, s. 6, contained no limitation of that right.

[**EDITORIAL NOTE.** It is thought that the reason for the insertion of the provisions here dealt with was to give the workman a right against the main contractor, who would probably be in a more substantial position financially than the subcontractor. The contention that the claim to indemnity can be resisted on the ground that the accident was due to the fault of the principal or his workman is supported by certain *obiter dicta*, which have been noted in the textbooks. The Court of Appeal, however, have decided against this contention, and, therefore, against the view previously held, which, however, was not based on binding authority.

AS TO RIGHT OF PRINCIPAL TO BE INDEMNIFIED, see WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., p. 220; and FOR CASES, see DIGEST, Vol. 34, p. 265, Nos. 2255-2258.]

Cases referred to:

(1) *Greenwood, Ltd.* v. *Hawkings* (1906), 23 T.L.R. 72; 26 Digest 223, *1755*.

(2) *Topping* v. *Rhind* (1904), 6 F. (Ct. of Sess.) 666; 34 Digest 265, case *2256 i*.

(3) *Cory & Son, Ltd.* v. *France, Fenwick & Co., Ltd.*, [1911] 1 K.B. 114; 34 Digest 496, *4094*; 80 L.J.K.B. 341; 103 L.T. 649.

(4) *Mowbray* v. *Merryweather*, [1895] 2 Q.B. 640; 34 Digest 182, *1488*; 65 L.J.Q.B. 50; 73 L.T. 459.

APPEAL by the respondent from an award of His Honour JUDGE FORBES, sitting as an arbitrator in the West London County Court on Mar. 14, 1940. The facts are fully set out in the judgment of SLESSER, L.J.

F. A. Sellers, K.C., and *Gilbert Dare* for the appellants.

J. F. F. Platts Mills for the respondents. A

Sellers, K.C.: The obligation was not absolute. The claim to indemnity by the principal can be defeated in at least three ways. The first is by showing that the accident to the workman was caused by the principal's breach of contract with the contractor: *Mowbray* v. *Merryweather* (4). Secondly, the principals could not recover because B they were themselves guilty of the negligence which caused the accident: WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., p. 220, *Greenwood* v. *Hawkings* (1), *Topping* v. *Rhind* (2) and *Cory* v. *France & Fenwick* (3). Thirdly, the principal was bound under his contract to provide for the contractor and the contractor's workman a scaffold which complied C with the Building Regulations, 1926. The principal broke these regulations, and, therefore, could not recover. The wording of sect. 30 (2), which was dealt with by the Court of Appeal in *Cory* v. *France & Fenwick* (3) is similar.

Platts Mills was not called upon. D

SLESSER, L.J.: In this case, it has been ordered that the respondents do pay to the applicants the sum of £108 paid by them as compensation for personal injury caused to one Albert Edward Taylor. The case is one brought under the provisions of the Workmen's Compensation Act, E 1925, s. 6 (2), by an employer, therein called the principal, against the immediate employer of the workman, who is called the contractor. Sect. 6 (1) provides as follows:

> Where any person . . . in the course of or for the purposes of his trade or business, contracts with any other person . . . for the execution by or under F the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for references to the employer.

G

In the circumstances of this case, the judge has come to the conclusion that the applicants here, Heywood & Bryett, Ltd., were principals within the meaning of sect. 6 (1), and that the respondents, A. Heywood & Son, were the contractors.

The facts of the case, so far as material, are these. The applicants are H builders, and for the purpose of their business they have found it necessary in the erection of their buildings to employ subcontractors. They did the navvying and carpentry themselves, but they had subcontractors for a number of operations, including plumbing, and for that purpose they employed the respondents. The injured workman was the servant of the respondents, but the judge has come to the conclusion, after a consideration of the written terms of the contract between the builders and the respondents, that it was the business of the applicants, the builders, to provide matters other than the actual labour of doing the plumbing. That is to say, the scaffolding which was used for the purpose A of doing the plumbing should be provided by the applicants. His actual words are:

> I think the implication of that estimate, accepted orally, was that, in the particular circumstances of this case, the applicants should provide scaffolds for exterior work or external plumbing work, as it is called in the estimate, and that the respondents should use scaffolding provided by the applicants.

B Therefore, it is clear that, within the meaning of sect. 6 (1) of the Act, the applicants, the builders, were principals, and the respondents, the plumbers, were the contractors. The judge has come to the conclusion that, in the imperfect provision of guards to this scaffolding, and in the failure of the applicants, the principals, to fix the structure firmly— C referring particularly to a door frame which stood erect, and was unstable, and gave way, although it appears to have been used as a part of the scaffolding—the applicants were guilty of a breach of the Building Regulations, 1926, reg. 13, made under the Factory and Workshop Act, 1901. Reg. 13 provides as follows:

D

> Where a scaffold has not been erected by or under the superintendence of the employer whose workmen use it, the employer, before allowing workmen to proceed thereon, shall satisfy himself, either personally or by his agent, that the scaffolding is in a stable condition, and that the materials used in its construction are sound, and that the required safeguards are in position.

I think that he has also come to the conclusion that the applicants E were negligent in that they provided this defective scaffolding, but none the less he has come to the conclusion that the applicants are entitled to the indemnity which they seek, though he says that he regrets it. The reason, apparently, which has moved him to come to that conclusion is that, although he thinks that the applicants would not be F entitled to their indemnity by reason of the fact that they were guilty of a breach of statutory regulations, or were negligent, he comes to the conclusion that the respondents were also negligent, and that the two acts of negligence cancel one another out, and, therefore, in the result, the respondent cannot rely upon the alleged negligence of the applicants. G I mention that because, in my judgment, the judge was quite wrong in the conclusion to which he came in assuming, in the first place, that the negligence of the applicants, which he has found, would in itself disentitle them to their indemnity, and, although I have come to the conclusion, for reasons which I will explain, that this appeal fails, yet it is H for reasons quite other than those which are stated by the judge in his judgment. Of course, I assume the facts to be as he has found them, and there is no question that there was not evidence on which he could come to that conclusion.

In my opinion, this case turns entirely on a proper consideration of sect. 6 (2). As I have said, under sect. 6 (1) it is clear, in the circumstances of this case, that the applicants were principals and A. Heywood & Son were contractors. In those circumstances, the injured workman was entitled, not only to seek compensation, as he would have been, apart altogether from this section, from the respondents, his immediate employers, but also to seek compensation from the principals, and, as I have said, he did in fact recover compensation from them to the extent of £108. That is a provision under sect. 6 (1) for the advantage of the workman. It gives him a right to obtain compensation from somebody who is not the employer, but who is to be deemed to be the employer if he satisfies the requirements of that subsection. He could, of course, if he liked, from the outset have sued his own employer for compensation, on the principle that he had met with an accident arising out of and in the course of his employment. Sect. 6 (2) provides as follows:

> Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section.

Those words appear to me to be absolutely clear and unambiguous, and, as has frequently been stated, where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. I ask myself where any words of limitation are to be found in the words: "Where the principal is liable to pay compensation under this section." I have already explained that this principal was liable by reason of subsect. (1), and, whether the accident arising out of and in the course of the employment which created the liability to pay the compensation was caused by the negligence of the employer, by the negligence of the workman, by an accident, by an act of God or by any other means, the liability to pay compensation is exactly the same. The only qualification in the case of the workman may arise in certain cases of misconduct, which are referred to in the statute, where the disability is only partial, but, so far as the employer is concerned, it matters not, if the accident arose out of and in the course of the employment, whether it was due to a breach of statutory regulation, or to negligence, or to any other cause. True it is that these matters may give rise to rights in the employer to bring actions for damages other than the duty to pay compensation, but the liability to pay compensation, if the provisions of sect. 1 of the Act are satisfied, is unqualified. The employer being liable to pay compensation, sect. 6 (2) continues as follows:

> . . . he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section.

I have already pointed out that, independently of this section, the respondents would have been liable to pay compensation to the workman, and, therefore, the principal is entitled to be indemnified, in the circumstances. There is nothing very startling about this provision. It was passed, as I have said, for the benefit of the workman, and it merely amounts to this. Though the workman is given recourse both to the employer and to somebody else who was not the employer, at his option, if that other person satisfies the conditions of subsect. (1), the employer, if that other person seeks indemnity, is no worse off than any other employer who is liable to a workman who recovers as a result of injury A sustained by accident in his employment. That determines this case in favour of the respondents in this appeal. The applicants have shown that they are entitled to the indemnity within the plain language of subsects. (1) and (2) of this section, and that, really, on the findings of fact of the judge which bring the principal and the contractor within B sect. 6, would put an end to this appeal.

However, there are certain observations in cases which have been cited to us to which it is right one should have regard. First of all, there is *Greenwood* v. *Hawkings* (1), a judgment of BIGHAM, J., in which he came to a conclusion with regard to an accident indemnity under the C Workmen's Compensation Act, 1897, that there he was satisfied that the plaintiffs, who were the building contractors who had employed subcontractors, were not negligent. However, he did make the observation that he had some doubt at first as to whether the plaintiffs had not so far contributed to the accident by what might be called their D negligence as to make it impossible for them to recover. If those observations are directed to the provisions of sect. 6 (1), (2), and deal with similar language, then, respectfully, I would point out, first of all, that they are only *obiter*, since the judge decided that the plaintiffs were not negligent. Secondly, I do not think that the contribution E to the accident by negligence could make it impossible for a person availing himself of what is the equivalent now of sect. 6 (2) to recover, but I do not regard that case as a case where BIGHAM, J., can be considered properly to have decided any such question.

The other case which is immediately dealing with this subsection or F its earlier equivalent is *Topping* v. *Rhind* (2). There LORD KINNEAR, dealing with this matter, which again is only dealt with as *obiter*, says, at p. 675:

> But there remains the third point which the reclaimer argued. He said that the pursuer could not recover from his subcontractor in this case, because the G injury caused to the workman was due to the pursuer's own fault. I do not know if it is necessary in this case to decide that that would be a complete answer, but there is certainly very high authority for that view . . .

I have been unable to find any such high authority, and the highest authority—namely, the High Court of Parliament—seems to have H declared to the contrary effect. LORD KINNEAR continues as follows, at p. 675:

> . . . and as at present advised, I cannot see that sect. 6 of the statute could receive full effect unless it had the effect maintained by the reclaimer. If a contractor has injured one of his workmen by his own fault, he cannot according to the argument recover an indemnity from a subcontractor, because the statute says that wherever an injury is caused under circumstances creating a legal liability against someone other than the employer, and if compensation be paid under this

> Act by the employer, the employer shall be entitled to be indemnified by the defaulting person.

The reference there to the words "under circumstances creating a legal liability" to pay does seem to deal, I should have thought, with words which in terms appear in sect. 30, and not in sect. 6. The language of sect. 6 is, as I have already quoted, "liable to pay to any workman A compensation," but, however that may be, that case, I think, can be no authority here, and I think that LORD KINNEAR was there directing his mind, having regard to the language used, rather to sect. 30 than to sect. 6, though I am aware that WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., seems to think that the language is directed B to sect. 6. In any case, as I point out, the words are not "a legal liability," but "the liability to pay compensation," which may raise a very different question.

Finally, we have been referred to *Cory & Son, Ltd.* v. *France, Fenwick & Co., Ltd.* (3), which admittedly deals with sect. 30 and not with sect. 6 C of the Act at all. I for one do not propose to embark upon the difficult question as to the ambit of sect. 30, which, I think, has no direct bearing on the present case, but I would point out, in the first instance, that sect. 30 is dealing with a legal liability to pay damages, and it may raise all sorts of questions in regard to liability in tort and the liability D of joint tortfeasors which do not apply at all to sect. 6. It is to be observed that the condition, "If the workman has recovered compensation . . . the person by whom the compensation was paid, and any person who has been called on to pay an indemnity . . . shall be entitled to be indemnified," is all conditional upon there being a liability E to pay damage, and, I think, is dealing with an entirely different subject-matter. I think that this is one of the few occasions where I have regretfully come to the conclusion that the note which is to be found in WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., cannot be relied upon. It is stated, at p. 220: F

> The contractor from whom indemnity is claimed by the principal can successfully resist the claim on the ground that the accident was due to the fault of the principal, *e.g.*, his negligence, or that of his workmen.

As at present advised, I do not see that there is any ground on which the contractor can refuse to pay the indemnity to the principal where the G principal is liable to pay compensation under the section and has paid compensation in the cases provided for in sect. 6 (1). I come to the conclusion, therefore, that this appeal must fail, but I dissent from the view of the judge that it fails because both parties were guilty of negligence. In my view, the absence or presence of negligence in the H case makes no difference to the unqualified operation of sect. 6 (1), (2).

SCOTT, L.J.: I agree, but venture to add a few words upon the interpretation of sect. 6. The subject-matter with which that section deals is the liability to pay compensation created by sect. 1 of the Act, and there is no underlying subject-matter except that. The section is not dealing with liability at common law either in tort or in contract. Its object is to ensure that a workman in certain cases shall be protected against the risk of his immediate employer being financially weak, and, therefore, perhaps unable fully to discharge his obligation to pay compensation under the Act. In order to achieve that purpose, the workman is given by Parliament a right to claim his compensation from a person in the position described by subsect. (1) of the section and there called "the principal." In relation to him, the workman's own immediate employer is in law an independent contractor, but, in a popular sense, he is, as it were, a quasi-employer, inasmuch as the premises where the work is done are his, and all men engaged upon work about them are doing work in his interest. The Act, therefore, taking that view, imposes upon him an obligation in law to pay the statutory compensation, and a responsibility in money to make the necessary payments, but, on the other hand, gives him the right to recover indemnity for those payments, or the liability for those payments, from the direct, and, in most cases, smaller, immediate employer, with whom he has made an independent contract for the execution of some of the work. Subsects. (2) and (3), read together, as I think they should be, make that position quite clear. There being no reference in the section to any common law liability, I see no justification for reading into subsect. (2) anything whatever to do with negligence, either on the part of the respondent to the application or on the part of the principal who makes the application. Those notions are wholly foreign to the section, which is a section concerned solely, as it seems to me, with compensation under the Workmen's Compensation Act, 1925. I therefore agree with the judgment pronounced by SLESSER, L.J.

LUXMOORE, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Walter O. Stein* (for the appellants); *Hewitt, Woollacott & Chown* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

R. *v.* FUSCHILLO.

[COURT OF CRIMINAL APPEAL (Hawke, Charles and Hilbery, JJ.), **April 15, 1940.]**

Criminal Law—Receiving stolen property—Proof of theft—Proof of recent thefts of goods of the same kind—No actual proof of theft or of ownership of the goods subject of charge—Whether surrounding circumstances sufficient proof.

The appellant was convicted of receiving sugar well knowing it to have been stolen. There was no actual proof as to the ownership of the goods, or that they had been stolen. The appellant, who had been granted an allowance of 1¾ cwt. of sugar per week by the food executive officer had upon his premises 26 cwt. of sugar. The appellant, upon being cautioned by the police and told that there was reason to suppose that the sugar had been stolen, said, "I don't know why I took it," and, upon being asked if he would say where it came from, said: "Be satisfied, and take it away, but don't take me." It was contended that there was not sufficient evidence for the jury to consider whether, when he received the sugar, he knew that it had been stolen:—

HELD: the surrounding circumstances provided sufficient evidence to go to the jury on the charge, and the conviction was amply justified A by the evidence.

[**EDITORIAL NOTE.** Although, on a charge of receiving stolen goods, there must be proof that the goods have been stolen, the circumstances in which an accused person has received the goods may of themselves be sufficient proof that they have been stolen, and, further, may prove that he knew this when he received them. B It is not a rule of law that there must be strict evidence of the theft, but the court may find, as it has found here, that there are sufficient circumstances to prove that the goods, to the knowledge of the accused, had been stolen.

As TO RECEIVING STOLEN GOODS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 554, 555, para. **941**; and FOR CASES, see DIGEST, Vol. 15, pp. 962-965, Nos. 10,753-10,772.] C

Case referred to:

(1) *R.* v. *Sbarra* (1918), 87 L.J.K.B. 1003; 15 Digest 963, *10,757*; 119 L.T. 89; 13 Cr. App. Rep. 118.

APPEAL against a conviction and sentence at the Central Criminal Court of receiving sugar well knowing that it had been stolen. The facts D are fully set out in the judgment of the court delivered by CHARLES, J.

E. J. P. Cussen for the appellant.

E. Anthony Hawke for the Crown.

CHARLES, J. [delivering the judgment of the court]: In this case, Silvio Edward Fuschillo was convicted at the Central Criminal Court E of receiving sugar well knowing at the time he received it that it had been stolen. He was sentenced to 18 months' imprisonment, and he now appeals against his conviction and sentence.

The case presents some rather unusual aspects of the law relating to receiving goods well knowing them to have been stolen. There was no F actual proof as to the ownership of the goods, and there was no actual proof that the goods had been stolen, but it was argued by counsel for the Crown that this case was akin to *R.* v. *Sbarra* (1). The circumstances of that case are not exactly the same as the circumstances of this case, but it was laid down in that case by the court (DARLING, COLERIDGE and G SALTER, JJ.) as follows, at p. 1004:

> The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen, and, further, may prove that he knew it at the time when he received them. It is not a rule of law that there must be other evidence of the theft. We have come to the conclusion that the circumstances here were enough to prove that the goods had been stolen. H

Thus it becomes necessary to see what the circumstances were in this case. On Oct. 2, the food controller—or, as he is called, the food executive officer—for the district of Bermondsey saw Fuschillo, and asked him, in accordance with his powers, to declare what stock of sugar he had. Fuschillo declared that he had 5 cwt., and asked for 3 cwt. per week, and was granted an allowance of $1\frac{3}{4}$ cwt. per week. The shop in which the sugar was found was a very small shop indeed. It was kept by the appellant's mother, and managed by him, in the front room of a corner house in Bermondsey. What was found in that little shop? All sorts of things. In the scullery and side passage, which, it is to be observed, could be reached from the side street, were found twelve 2-cwt. sacks of granulated sugar and two 1-cwt. sacks of granulated sugar, and the sacks had various marks on them. The police, who were inquiring into the theft of commodities of this sort, in consequence of information they had received, went to the appellant's house. The appellant was not there, and this enormous quantity of sugar was found in the shop. There was no room in the shop for all the sugar, and much of it was found in the passage. When the appellant came in and saw the police, he said that he had been a fool and stated that his mother knew about it. Then he was cautioned and was told that there was reason to believe that the sugar was stolen. He replied:

> I don't know why I took it in. I'm a fool. This means going away.

There he was a true prophet, because he did go away. The police officer seems to have acted with great propriety and with due care, for he said: "Do you care to tell me where it came from?" The appellant said: "Be satisfied, and take it away, but don't take me." On the way to the police station, the appellant said: Can't we do something about this? For the old lady's sake, take the stuff away, and don't charge me.

These were the surrounding circumstances in this case, and it was suggested to us by counsel for the appellant, who has argued the case with great tenacity and ability, that there was no sufficient evidence for the jury to consider on the question whether or not he knew at the time he received the sugar that it was stolen. It is to be observed that Fuschillo himself did not take advantage of the rule of law which allows him to give evidence on his own behalf. We have come to the conclusion on every point of view that there was evidence to go to the jury on the charge. He was sentenced to 18 months' imprisonment, and it is to be observed that the police officer said that there had been a number of these thefts from lorries, and that it was in the hope that they would discover where that sugar went that they got a search warrant to search this little shop. The appellant is not a man who has always borne a good record. At the County of London Sessions in Apr., 1938, he received a sentence of 6 months for receiving eggs, and now he has received 18 months for receiving sugar well knowing that it was stolen. We have come to the conclusion that the conviction was amply justified by the evidence, and the appeal is dismissed.

Appeal dismissed.

Solicitors: *J. Albert Davis & Co.* (for the appellant); *Metropolitan Police Solicitor*, New Scotland Yard (for the Crown).

[*Reported by* W. J. ALDERMAN, ESQ. *Barrister-at-Law.*]

Re SYKES, YOUNGHOUSE *v.* SYKES AND OTHERS.

[Chancery Division (Bennett, J.), **April 11, 1940.**]

Wills—Construction—Option to purchase shares—Donee assigning benefit of option and dying without exercising it—Whether option exercisable by donee's executors or by assignees.

The testator by his will dated Feb. 15, 1911, gave his son an A
option to purchase certain shares upon the death of the testator's wife or previously thereto whenever the trustees should proceed to realise that part of his estate. During his lifetime, the son assigned the benefit of the option to trustees for the purpose of securing an annuity for his wife. He survived the testator's wife, but died without having exercised the option :— B

Held : the option to purchase was personal to the son, and was not exercisable after his death by his executors or assignees.

[EDITORIAL NOTE. An option to purchase property given by a will is *prima facie* personal to the donee of the option, and it would appear to be necessary to find express words in the will pointing to a transmissible option if the contrary construction is to be adopted. C

As to Options to Purchase in Wills, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 529-531, para. 1045 ; and for Cases, see DIGEST, Vol. 44, p. 211, Nos. 384-386.]

Cases referred to :

(1) *Re Cousins, Alexander* v. *Cross* (1885), 30 Ch.D. 203 ; 23 Digest 294, *3597*. D
(2) *Belshaw* v. *Rollins,* [1904] 1 I.R. 284 ; 44 Digest 211, case *385 i*.

Adjourned Summons to determine whether an option given by a testator to one of his sons to purchase certain shares in a named company, the option being given to the son by the testator's will, is exercisable by the son only, or whether, the son having died, the option is exercisable E
either by his legal personal representatives or by assignees to whom during his lifetime he had assigned the benefit of the option. The facts are fully set out in the judgment.

E. M. Winterbotham for the plaintiff.

Roger W. Turnbull for the first defendant, the second son of the testator. F

T. A. C. Burgess for the second and third defendants, legal personal representatives of the first son of the testator.

L. M. Jopling for the fourth defendant, one of the trustees to whom was assigned the benefit of the option in the testator's will.

G

Bennett, J. : The testator made his will on Feb. 15, 1911, and died on Sept. 9, 1916. The will was proved on Nov. 16, 1916, by his widow, Clara Victoria Sykes, and his son Edward Musgrave Sykes, a second son, Leonard Musgrave Sykes, named as an executor in the will, having renounced probate. The testator's widow, Clara Victoria Sykes, H
died on May 18, 1939, and his son Edward Musgrave Sykes died on June 29, 1939, his legal personal representatives being the defendants Alan John Skelton and Joe William Dyson. New trustees of the testator's will were appointed on Jan. 4, 1940, they being the plaintiff and the first defendant, Leonard Musgrave Sykes.

The provisions of the testator's will are these. He gives all his real and personal estate whatsoever and wheresoever to his executors upon trust for realisation and conversion, with power to postpone the sale or conversion of the whole or any part or parts of his trust property, and he directs his executors to pay his just debts, funeral and testamentary A expenses, and to invest the residue in their names, and to pay the income of the trust moneys and the investments thereof for the time being to his dear wife for and during her natural life, and from and after the decease of his wife he declares that his trustees are to stand possessed of all the proceeds, moneys and trust premises upon trust for his sons Edward B Musgrave Sykes and Leonard Musgrave Sykes in equal shares, and, in the event of either of them predeceasing his wife without leaving issue, his share of his real and personal estate shall pass to the survivor of his sons absolutely, but, if married and having left issue who shall survive his wife and shall attain the age of 21 years, his surviving C child or children shall, on attaining the age of 21 years, enter into possession of the father's share of his estate, and, if more than one, in equal shares.

Then there is an investment clause, and following the investment clause is the provision which gives rise to the question raised by this D summons. The terms of that provision are as follow:

> Whereas part of my estate consists of the shares in the English Card Clothing Co., Ltd., now standing in the name of my son Edward Musgrave Sykes as registered owner, and I am desirous that my said son shall have the opportunity of becoming absolute owner of the same shares now I hereby declare and direct that upon the decease of my said wife or previously thereto in case or whenever E my trustees shall proceed to realise the part of my estate consisting of or including such shares and my beneficial right thereto and ownership thereof my son Edward Musgrave Sykes shall have the option of purchasing and becoming absolute owner of the said shares or any part thereof and all my estate interest right and title therein and thereto the value of such shares for the above purpose to be estimated at par value.

F The son Edward Musgrave Sykes was registered as the holder of 300 shares, each of £10, in the English Card Clothing Co., Ltd., at the time when the testator died. The company was a private company, and art. 42 of its articles of association provided as follows:

> No transfer of a share or shares shall be made without the same being first offered to the directors at the market price to be ascertained in accordance with art. 43. G Should the directors within 30 days of the same being offered to them accept the share or shares on behalf of one or more of their number or his or their nominee or nominees, the share or shares shall be transferred accordingly. If the directors do not accept or decline the offer within 30 days the shareholder shall be at liberty to deal with the share or shares as he may think fit, subject to art. 42.

Then there follows art. 43, which contains provisions for enabling the H market price of the shares to be ascertained. After the testator's death, those 300 shares of £10 each were converted into 3,000 ordinary shares of £1 each, and, subsequently, as the result of a capitalisation of profits, 1,500 fully-paid ordinary shares were issued to Edward Musgrave Sykes in respect of his holding of 3,000 ordinary shares. In his lifetime, on July 26, 1932, for the purpose of securing an annuity to his wife, from whom he had been divorced, the benefit of the option given to him by the testator's will was assigned to trustees, the defendant Alan John Skelton and the defendant Norman Hugh Matthews.

As I have said, after the death of the widow, Edward Musgrave Sykes died on June 29, 1939. He never exercised the option, given to him by the testator's will, of purchasing these shares in the English Card Clothing Co., Ltd. After his death, on Nov. 29, 1939, his executors gave notice in writing to one Leonard Sykes, who was then entitled to the whole of the residuary estate of the testator, " and to all whom it may concern," exercising the option given to Edward Musgrave Sykes by the testator's will in respect of 4,500 shares. On Feb. 14, 1940, the defendants Skelton and Matthews, as trustees of the deed of assignment of July 26, 1932, upon the footing that they were assignees of the option given to Edward Musgrave Sykes by the testator's will, also exercised the option given to Edward Musgrave Sykes by the will, and notice of that exercise was also given to Leonard Musgrave Sykes and to all whom it might concern.

The question which I am going to decide, the first one raised by the originating summons, is whether, upon the true construction of the will of the testator, the option thereby given to his son Edward Musgrave Sykes of purchasing and becoming the absolute owner of certain shares in the English Card Clothing Co., Ltd., therein described, ceased to be exercisable on the death of Edward Musgrave Sykes. In my judgment, it did, and I so decide upon what I conceive to be the authority of the decision of the Court of Appeal in *Re Cousins, Alexander* v. *Cross* (1). In JARMAN ON WILLS, Vol. I, p. 73, there occurs this passage :

> An option of purchase given by will to A.B. is *prima facie* personal to him, and does not pass to his executors on his death . . .

In support of that proposition, *Re Cousins, Alexander* v. *Cross* (1) is cited. The authors go on to state that the will may be so expressed as to confer a transmissible interest, and in support of that proposition an Irish authority, *Belshaw* v. *Rollins* (2), is cited.

It is contended on behalf of the executors of Edward Musgrave Sykes, and also on behalf of the trustees under the deed of assignment of July 26, 1932, that *Re Cousins, Alexander* v. *Cross* (1) is no authority upon any question of principle, and that the question turns entirely upon the construction of the will of the testator whose testamentary dispositions were under consideration in the Court of Appeal. At one time, I inclined to that view, but I think that, when one looks carefully at the language used by COTTON and LINDLEY, L.JJ., in their judgments in that case, their language does support the proposition stated in JARMAN ON WILLS, Vol. I, p. 73, and does establish that *prima facie* an option to purchase given by will to a named person is personal to him, and does not pass to his executors or confer a transmissible interest. SIR WILLIAM BRETT, M.R., and LINDLEY and COTTON, L.JJ., distinguish the case of a will from that of an option granted by a contract, and I think that the decision is rested by COTTON and LINDLEY, L.JJ., on the ground that *prima facie* an option given by will is personal, and that there must be found in the will which gives the option some indication that it is exercisable by the executors of the person to whom it is given if the contrary is to be held.

In this will, in my judgment, there is nothing which can form the foundation for an argument that the testator has shown an intention that the option he gave to his son was to be exercisable by anyone other than the son. On the contrary, I think, for the reasons advanced by counsel for the first defendant upon the dispositions made by the testator of his estate, that it looks as if the testator were contemplating and intending that the option should be exercisable by the son only. However, I am not deciding the case on that ground. I am deciding it upon the ground that, in my view, the decision in *Re Cousins, Alexander* v. *Cross* (1) does support the proposition stated in JARMAN ON WILLS, Vol. I, p. 73, and in this will I can find no language to indicate that the option given by the testator to his son is to be exercised by any person other than the son, and I so answer the question raised by the summons. The costs of all parties as between solicitor and client must be paid out of the testator's estate.

Solicitors: *Skelton & Co.*, Manchester (for all parties other than the fourth defendant); *S. F. Miller, Mathews & Co.*, agents for *Taylor, Kirkman & Mainprice*, Manchester (for the fourth defendant).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

HOTEL REGINA (TORQUAY), LTD. *v.* MOON.

[KING'S BENCH DIVISION (Hawke, Charles and Hilbery, JJ.), **April 18, 1940.**]

Intoxicating Liquors—Offences—Sale of liquor by retail without excise licence—Sale of bottled beer by servants of hotel to guests—Liability of manager and proprietors—Finance (1909-10) Act, 1910 (*c.* 8), *s.* 50 (3).

The appellants, who were respectively the proprietors and the managers of an unlicensed hotel, were charged and convicted, together with two employees, the head waiter and the boots, of selling beer by retail without licence, contrary to the Finance (1909-10) Act, 1910, s. 50 (3). The employees, who pleaded guilty to the charge, obtained liquor from a neighbouring licensed house, stored it in a cupboard in the hotel, and sold it to guests when it was ordered. The profits were shared between the employees, no portion being paid to the appellants. It was found as a fact that the manager, who attended the hotel daily, but did not reside there, knew that the employees were selling beer:—

HELD: on the facts, the appellants had an indirect interest in the sale of liquor, and took part in the sales, and were, therefore, liable under the statute, as they had no excise licence.

[EDITORIAL NOTE. The main question here is whether the offence actually committed by the servants can be made the subject of a charge against the manager and proprietors of the hotel. There is also a discussion based upon a contention that only a person having the actual property in goods can sell them, but this contention is rejected without difficulty.

As to Sale of Intoxicating Liquor Without Excise Licence, see HALSBURY, Hailsham Edn., Vol. 19, pp. 131, 132, para. 311; and for Cases, see DIGEST, Vol. 30, pp. 77, 78, Nos. 608-616.]

Case referred to:

(1) *Mellor* v. *Lydiate*, [1914] 3 K.B. 1141; 30 Digest 78, *615*; 84 L.J.K.B. 8; A
111 L.T. 988.

Appeal by way of case stated from a decision of justices for the borough of Torquay.

Two customs and excise officers booked a room at the appellants' B
hotel, which was not licensed, and at dinner the head waiter supplied them with two bottles of light ale, for which they paid 1*s*. 2*d*. Before taking the order, the waiter said that any liquor which they might order would be sent for from licensed premises adjoining the hotel. On the following day, the two customs and excise officers were again C
supplied at lunch and dinner by the head waiter and the hotel boots with beer, for which they paid. The beer was obtained from a cupboard in the hotel, which, according to the appellants, was provided by them as a place for the waiters to store intoxicating liquor purchased elsewhere by, and belonging to, guests staying in the hotel. The cupboard D
contained about 60 bottles of beer, stout and cider, in crates. None of the bottles bore a label indicating that it had been purchased by a guest in the hotel. A price list issued by a licensed house in the vicinity, showing the prices which guests were to be charged for beer and cider, was in the cupboard. The beer and cider in the cupboard were used E
for sales to guests in the hotel, and the profits derived from sales were shared between the head waiter and the boots, no portion thereof being paid to the appellants. The head waiter was authorised by the appellants to receive orders for liquor from the guests and to keep the liquor in the cupboard. The head waiter and boots pleaded guilty F
to the charge of selling beer by retail without licence, contrary to the Finance (1909-10) Act, 1910, s. 50 (3), and were convicted and fined. Similar charges were preferred against the appellants, who were convicted and fined. The appellants were proprietors and occupiers of the hotel. The directors of the appellant company were Plum and G
his wife, who were also the managers who attended at the hotel daily, but did not reside there. Evidence was given for the appellants that the head waiter and the boots had no authority to sell the beer contrary to law, and that Plum had no knowledge that they were so doing. The justices found that Plum knew that his employees were selling the beer H
and committing the offences to which they pleaded guilty. It was contended, on behalf of the appellants, that the matter was *res judicata*, owing to the conviction of the employees, and that the appellants could not also be convicted of selling beer contrary to the statute, that there was no evidence upon which the justices could find that the sale was

with Plum's knowledge, that the appellants and Plum had derived no monetary profit from the sales, that the employees had no authority from the appellants to sell the beer, and that there was no sale on behalf of the appellants. For the respondents, it was contended that there was evidence on which the justices could find that the appellants knew A of the sales, and that they, or Plum, had received indirect benefit by the facilities afforded to guests for obtaining intoxicants easily and without delay, and at any hour.

G. O. Slade for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and B *Valentine Holmes* for the respondent.

HAWKE, J.: In this case, I think that I can speak of the appellants as Plum, who, in the name of a company, keeps a hotel in Torquay. Two persons were convicted of selling beer on those premises without a C licence. The question which arose in this case was whether the manager or the company was involved in the two sales of which they were convicted. This licence duty was imposed so that intoxicating liquors sold on licensed premises should make their contribution to the national exchequer. The Finance (1909-10) Act, 1910, s. 50 (3), provides as D follows:

> If any person sells by retail any intoxicating liquor, for the retail sale of which he is required to take out a licence under this Act, without taking out such a licence, he shall be liable in respect of each offence . . .

We have only to find out what the facts were and what part these E appellants took in that sale. They provided the accommodation where the sale should take place. They provided light and heat, and the usual accessories of a place of residence. They attracted purchasers, and thereby introduced them to the persons who actually sold the beer. They provided the cupboards in which it was to be kept, although F I agree that the case does not say so. They provided the glasses or other receptacles out of which the beer was consumed. They intended to have the transaction carried through, because they had an interest in the transaction being carried through. The magistrates have said that they had an indirect interest in it. I think that the magistrates G found that as a fact, although counsel for the appellants points out to us that, as first stated in the case, it is only a contention. However, what they said afterwards shows, I think, that they found it as a fact. What that indirect interest was the magistrates have not said in so many words, but it seems to us that it must be one of two things, if H not both—namely, that these sales tend to improve and increase their own business, and that, this being a perquisite of the servants, by reason of those perquisites they will probably get servants at lower wages than if there were no such perquisites. Counsel for the appellants says that that amounts to mere connivance. He also says that nobody can be convicted under this statute save the person who actually has the property in the particular commodity passing on the sale. We do not agree with that. We think that all the facts which I have mentioned clearly show that these appellants took part in the sale, and that, therefore, they are liable to be fined under the statute, because they had no excise licence. The magistrates came to a correct determination and decision in point of law upon the facts stated, and this appeal A ought to be dismissed.

Charles, J.: I entirely agree, and have nothing to add.

Hilbery, J.: I entirely agree. I only desire to add a few words B upon what lies at the basis of the very clear argument addressed to us by counsel for the appellants. At the very basis of that argument lies the proposition that the only person who can effect a contract of sale is the person in whom rests the ownership of the goods. That statement is, in my view, completely fallacious. It is true that, under the contract C of sale, the legal property in the goods is passed, and that a vendor must be able to pass property in the goods. That is quite a different thing, however, from saying that the only person who can sell an article is the person who is the legal owner. I gave counsel for the appellants an example of a sale by a person entrusted with goods on sale or return. D That is a perfectly good selling of the goods by him, though he is not the person who has the legal ownership of the goods, because he has sufficient property in them to pass a good title. I agree with what the Attorney-General pointed out—and counsel for the appellants conceded this in his reply—that *Mellor* v. *Lydiate* (1) could not have E been decided as it was decided if that proposition was complete and correct. If we treat it as a matter of everyday affairs, and not as an occasion for legal sophistry, I think that this case is a simple one.

Appeal dismissed with costs.

Solicitors: *Walter Crimp & Co.*, agents for *Kitsons, Hutchings,* F *Easterbrook & Co.*, Torquay (for the appellants); *Solicitor for Customs and Excise* (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

G

JACOBY *v.* PRISON COMMISSIONERS.

[King's Bench Division (Macnaghten, J.), **April 17, 1940.**]

Public Authorities—Limitation of actions—Prisoner on remand provided with furnished cell in pursuance of contract with prison commissioners—Injury suffered through alleged defect in china chamber provided—Whether prison commissioners a public authority—Prison Act, 1877 (c. 21), *ss.* 6, 9, 39—*Public Authorities Protection Act,* 1893 (c. 61), *s.* 1—*Prison Rules,* 1933 (*S.R. & O.,* 1933, *No.* 809), *r.* 122.

The plaintiff was committed to prison on remand, and, in consideration of a sum of 12*s.* per week paid by him to the prison commissioners, was provided with a furnished cell, which contained, *inter alia*, a china chamber. While the plaintiff was using this chamber on Mar. 7, 1938, it split into a number of pieces, owing to pressure put upon it, and one of these pieces pierced the plaintiff's spine. On May 11, 1939, the plaintiff issued a writ against the prison commissioners in respect of injuries thereby suffered, and the prison commissioners raised the defence, *inter alia*, that the action was barred by reason of the provisions of the Public Authorities Protection Act, 1893. The prison commissioners are a body corporate constituted under the provisions of the Prison Act, 1877, s. 6. Sect. 39 of that Act, and the rules made thereunder, permit a prisoner on remand to occupy, on payment of a small sum fixed by the commissioners, a cell specially fitted and suitably furnished, and it was assumed that it was in pursuance of a contract made with the commissioners in accordance with those provisions that the plaintiff was provided with the cell and with the chamber :—

Held : the provision of the china chamber was an act done by the prison commissioners in pursuance or execution or intended execution of a public duty, and the action was, therefore, out of time and barred by reason of the Public Authorities Protection Act, 1893.

[**EDITORIAL NOTE.** A person detained on remand is, of course, in a position very different from that of a convict. The only question here is whether, in their dealings with a person on remand, the prison commissioners are able to take advantage of the protection given by the Public Authorities Protection Act, 1893, s. 1.

As to Who is a Public Authority, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-297, paras. 610-616 ; and for Cases, see DIGEST, Vol. 38, pp. 102-106, Nos. 732-760.]

Case referred to :

(1) *Lyles* v. *Southend-on-Sea Corpn.*, [1905] 2 K.B. 1 ; 38 Digest 102, *733* ; 74 L.J.K.B. 484 ; 92 L.T. 568.

Preliminary Issue of Law to determine the question whether an action was barred by the provisions of the Public Authorities Protection Act, 1893, s. 1. David Jacoby, whose address on the writ was given as His Majesty's Prison, Wandsworth, sued the prison commissioners to recover damages for injuries suffered, and consequential loss, by reason of the negligence and/or breach of contract and/or warranty of the defendants, their servants or agents. In the statement of claim, it was alleged that on Mar. 5, 1938, he was committed to Brixton Prison upon remand upon a charge of larceny, and that, in consideration of 12*s.* per week paid by him to the prison commissioners, the latter agreed to, and did, provide him whilst upon remand in the prison with a cell which was furnished, in that it contained a bed and other furniture, including a china chamber. From the particulars, it appeared that the alleged contract was oral, and was made with a warder. The statement of claim alleged that it was an implied condition of the contract that the china chamber was fit to be used by the plaintiff for the purpose for which it was required, and that the prison commissioners impliedly warranted to that effect. The statement of claim continued as follows : A

> In breach of the said contract and/or warranty the said china chamber was not fit to be used for the purpose for which it was required and/or the defendants provided a china chamber which was not so fit and/or which was unsafe or dangerous. . . . On or about Mar. 7, 1938, at about 7.30 a.m. the plaintiff used the said china chamber when by reason of the defendant's breach of contract and/or warranty and/or negligence in providing a china chamber not fit for the purpose for which it was required but which was unsafe or dangerous the said china chamber split into a number of pieces one of which pierced the base of the plaintiff's spine to a depth of 1½ inches. B

The plaintiff claimed special damage to the amount of £495 5*s*.

The prison commissioners' defence was a denial of the contract and the warranty. They also denied the negligence alleged against them. C They alleged that the injury which the plaintiff sustained was due to his own negligence in using the chamber for a purpose other than that for which it was provided, and in failing to avail himself of the water-closet accommodation provided in the prison. The prison commissioners further alleged that the action was not commenced D within 6 months next after the act, neglect or default complained of, and was barred by reason of the provisions of the Public Authorities Protection Act, 1893. Thereupon an order was made by MASTER BALL that the point of law thus raised by the defendants be set down as a preliminary issue of law. E

David Weitzman for the plaintiff.

Valentine Holmes and *John Senter* for the defendants.

MACNAGHTEN, J. : The prison commissioners are a body corporate constituted under the provisions of the Prison Act, 1877, s. 6, which F provided that Her Majesty might :

> . . . on the recommendation of the Secretary of State, at any time and from time to time [after the passing of this Act] by warrant under her sign manual appoint any number of persons to be commissioners during Her Majesty's pleasure, so that the whole number of commissioners appointed do not at any one time exceed 5, and may, on the recommendation of the Secretary of State, on the occasion of any G vacancy in the office of any commissioner by death resignation or otherwise, by the like warrant, appoint some other fit person to fill such vacancy. The commissioners so appointed shall be a body corporate with a common seal, with power to hold land without licence in mortmain so far as may be necessary for the purposes of this Act, and shall be styled " the prison commissioners."

They are to appoint all such officers of the prison as are by the Prison H Act, 1865, declared to be subordinate officers of the prison. Then sect. 9 provides as follows :

> . . . The prison commissioners shall also make contracts, and do all other acts necessary for the maintenance of the prisons and prisoners within their jurisdiction. The prison commissioners shall, in the exercise of their powers and jurisdiction under this Act, conform to any directions which may from time to time be given to them by the Secretary of State.

Sect. 39 of the Act, which deals with the case of persons who are awaiting trial, provides as follows :

> Whereas it is expedient that a clear difference shall be made between the treatment of persons unconvicted of crime and in law presumably innocent during the period of their detention in prison for safe custody only, and the treatment of prisoners who have been convicted of crime during the period of their detention in prison for the purpose of punishment, and that, in order to secure the observance of such difference there shall be in force in every place in which prisoners are confined for safe custody only, special rules regulating their confinement in such manner as to make it as little as possible oppressive, due regard only being had to their safe custody, to the necessity of preserving order and good government in the place in which they are confined, and to the physical and moral well-being of the prisoners themselves : Therefore, be it enacted, that the Secretary of State shall make, and when made may from time to time repeal, alter, or add to, special rules . . .

Then come three subsections setting out the subject-matter of the rules which may be made by the Secretary of State. It is the third of these classes which is relevant to this case—namely, that the Secretary of State shall make special rules :

> (3) With respect to arrangements whereby prisoners may provide themselves with articles of diet, or may be furnished with a sufficient quantity of wholesome food, and may be protected from being called upon to perform any unaccustomed tasks or offices ; also any matter which the Secretary of State may think conducive to the amelioration of the condition of a prisoner who has not been convicted of crime, regard being had to such matters as are in this section directed to be regarded.

Under the provisions of that section, the Secretary of State made the Prison Rules, 1933. Rule 122 provides as follows :

> The Governor or Visiting Committee may, on the application of any prisoner awaiting trial, permit him : (1) to occupy, on payment of a small sum fixed by the Commissioners, a suitable room or cell specially fitted for such prisoners, and furnished with suitable bedding and other articles in addition to or different from those furnished for ordinary cells, and to have at his own cost the use of private furniture and utensils approved by the Governor ; (2) on payment of a small sum fixed by the Commissioners, to be relieved from the duty of cleaning his room or cell and from the performance of other such unaccustomed tasks or offices.

Standing Order 266, which was presumably made by the commissioners, and not by the Secretary of State, provides as follows :

> Special cells shall be put apart for their use. A prisoner who occupies a room or cell especially fitted and furnished shall pay 5*s.* per week and in addition the sum of 1*s.* a day for being relieved from the performance of unaccustomed tasks or offices.

Apparently it is pursuant to the statutory provisions contained in the Prison Act, 1877, s. 39, and the rules made by the Secretary of State pursuant to the power conferred upon him by that section, that David Jacoby was provided with a cell of the character described in the rule and was charged the sum of 5*s.* for it and 1*s.* per day for the cleaning of it by some other prisoner.

The provisions of the Public Authorities Protection Act, 1893, s. 1, relevant to this case are as follows :

> Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect : (*a*) The action, prosecution, or proceeding shall not lie or be instituted

> unless it is commenced within 6 months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within 6 months next after the ceasing thereof . . .

The act, neglect or default complained of by David Jacoby is alleged to have occurred on Mar. 7, 1938. The writ in this action was issued on May 11, 1939, and, therefore, if the action is an action for any act done in pursuance, or execution, or intended execution of any Act of Parliament or of any public duty, it is barred by the provisions of the Public Authorities Protection Act, 1893, and so the question which has to be determined is whether the provision of this china chamber was an act done in pursuance or execution or intended execution of any public duty.

Counsel for the plaintiff argues that this matter has to be determined on the footing that the allegations contained in the pleading are true. The allegation in the statement of claim is that there was a contract between the prison commissioners and David Jacoby, and, although to some people that might seem to be a fantastic statement, nevertheless the matter must, for the decision of the preliminary issue of law, be dealt with on the footing that such was really the case, and that there really was an oral contract made between the prison commissioners and this plaintiff, and it must be assumed that the contract provided for the provision of a utensil suited to the use to which the prisoner put it. On the other side, it is said that in providing this cell and the furniture of this cell the prison commissioners were merely discharging a public duty imposed upon them by the Prison Act, 1877, and the rules made by the Secretary of State under sect. 39 of that Act. I think that that contention is right. The prison commissioners are, of course, men who obey the requirements of the statute and of the rules made by the Secretary of State. They have no authority to accommodate a prisoner on remand with a special cell and with special furniture of their own motion. They can only do so under the rules when the governor of the prison or the visiting committee has given permission that such a specially-fitted room or cell should be provided. The fact may perhaps be regarded as rendering it impossible for the prison commissioners to have made a contract, but, whether or not a contract was made, when once the governor or the visiting committee have given the prisoner permission to occupy a specially-fitted room or cell, it is plainly the duty of the prison commissioners to comply with their direction in the matter. Assuming that there was a contract between the prison commissioners and the prisoner for accommodating him with a specially-fitted cell, it was merely a contract to do that which, under the statute and the rules made under the statute, the prison commissioners were under a duty to do. I think that counsel for the defendants is quite right in saying that the matter is concluded by *Lyles* v. *Southend-on-Sea Corpn.* (1). The headnote to that case runs as follows:

> A municipal corporation constructed and worked an electric tramway under the authority conferred on them by an order made by the Light Railway Commissioners, in pursuance of the Light Railways Act, 1896, and confirmed by the Board of Trade,

and having therefore, by sect. 10 of that Act, the force of a statute. On the construction of the order the court held that it imposed on the corporation an obligation, after the tramway had been opened for traffic, to run cars and to carry passengers in them. A passenger on one of the cars, who had paid his fare and had taken a ticket in the ordinary form, without any special conditions, was while travelling injured by the fracture of the conducting-rod, which fell upon him. He brought an action against the corporation for damages, alleging that the accident had happened through the negligence of the defendants or their servants :—

A HELD, that the action was in substance founded on a breach by the defendants of their duty as a public authority under their Light Railways Order ; that they were entitled to the protection given by the Public Authorities Protection Act, 1893; and that, as the action had not been brought within 6 months from the happening of the injury, it must fail.

That was a decision of the Court of Appeal. In that case, undoubtedly, B there was a contract between the plaintiff and the defendants, as evidenced by the ticket which the plaintiff took, and, although there was a contract, it was a contract made pursuant to a statutory duty imposed upon them, and the court held that, in those circumstances, the Public Authorities Protection Act, 1893, applied. So, too, in this case, C assuming there is a contract between the prison commissioners and the prisoner on remand, that contract was merely a contract to do what the prison commissioners were bound to do under the statute and the rules made thereunder, if and so far as they are responsible for the actual management of each individual prison. I have read the section which D deals with the duties of the prison commissioners. Whether they are actually responsible for what is done by the visiting committee does not arise in this case, but, assuming that they are, I think that in this case the action, in order to be maintained, must be brought within 6 months from the date of the alleged injury, and, as it is brought out of time, my E answer to the point which is submitted to the court is that the action fails, and must be dismissed.

Action dismissed with costs.

Solicitors : *Hart Leverton & Co.* (for the plaintiff) ; *Treasury Solicitor* F (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

JOHNSTON *v.* CHARLES OSENTON & CO.

G [COURT OF APPEAL (Slesser and Clauson, L.JJ., and Singleton, J.), **March 5, April 15, 1940.**]

Practice and Procedure—Referring action to official referee—Claim based on negligence of professional man—Finality of official referee's decisions of fact—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), *s.* 89 (*b*)—*Administration of Justice Act,* 1932 (c. 55), *s.* 1.

H The plaintiff entrusted the defendants, a firm of estate agents, with the development of certain land as a housing estate. He subsequently brought an action against them for breach of contract and for negligence in performance of the obligations thus undertaken, alleging that they had been negligent in many matters in connection with the lay-out of the estate, more especially in respect of the system of drainage recommended by them and the density of houses on the estate. The plaintiff applied for an order under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89 (*b*) that the action be referred to an official referee, on the ground that it could not be conveniently tried by a judge, and the master made an order accordingly, which was upheld by the judge on appeal. It was mentioned both to the master and the judge that under the Administration of Justice Act, 1932, s. 1, the official referee's decision on questions of fact would be final:—

Held (Clauson, L.J., dissenting): having regard to the number of plans which might have to be examined, to the questions of a scientific nature involved in the consideration of the technique of the lay-out of the estate, and of the drainage problems raised, and also to the very probable need for considerable local investigation, there was ample material upon which the judge's discretion could be exercised, and, as it had been mentioned that the official referee's decision on questions of fact would be final, it could not be said that the judge had exercised his discretion on any wrong principle.

[**EDITORIAL NOTE.** The judgments in this case, which show some difference of judicial opinion, discuss how far the enactment in the Administration of Justice Act, 1932, that the decision of an official referee on a question of fact was not to be subject to appeal, has affected the exercise of the court's discretion in sending a case to be tried by one of the official referees where a serious question, such as negligence by a professional person, is raised. If the case were tried in the ordinary way, the defendant could have it retried by the Court of Appeal on a question of fact, but, if referred, the decision of the official referee will be final.

As to Referring Action to Official Referee, see HALSBURY, Hailsham Edn., Vol. 26, p. 87, para. 158; and for Cases, see DIGEST, Practice, pp. 567, 568, Nos. 2250-2253. See YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 622-625.]

Cases referred to:

(1) *Evans* v. *Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.

(2) *Hoch* v. *Boor* (1880), 49 L.J.Q.B. 665; 2 Digest 623, *2514*; 43 L.T. 425.

(3) *Sacker* v. *Ragozine & Co.* (1881), 44 L.T. 308; 2 Digest 623, *2520*.

(4) *Cooper* v. *Cooper*, [1936] W.N. 205; Digest Supp.

(5) *Gardner* v. *Jay* (1885), 29 Ch.D. 50, 58; Digest, Practice, 535, *1987*; 54 L.J.Ch. 762; 52 L.T. 395.

Interlocutory Appeal by the defendants from an order made in chambers by Tucker, J., on Feb. 13, 1940. The facts and arguments are fully set out in the judgment of Slesser, L.J.

Gilbert Beyfus, K.C., and *Montague Berryman* for the appellants.

J. P. Ashworth for the respondent.

Slesser, L.J.: In this case, the plaintiff applied to the master for an order that the action be referred to an official referee. The master made an order accordingly, and on appeal the judge affirmed his decision.

The defendants carry on business as estate agents and surveyors. According to the statement of claim, on Mar. 24, 1936, the plaintiff agreed to buy a property known as the Tilehouse Estate, Guildford, and instructed them to prepare a scheme for the lay-out of the property as a housing estate. In May, 1938, they were entrusted by the plaintiff with the development of the Tilehouse Estate and another property known as the Stoughton Farm Estate, which the plaintiff had agreed to buy on Apr. 13, 1937.

The complaint made is that in discharging the obligations which the defendants undertook in the development of the properties they were negligent in various ways—namely, generally, that the defendants failed to advise as to proper levels for drainage, suggesting an inappropriate method of drainage, or mismanaged the negotiations with the local authority as to drainage, delayed the whole scheme of development, failed to plan for the right values of the houses on the estate and arranged to lay out a drainage system which proved defective. These complaints are actually formulated in the statement of claim as follows:

> 5. For the purpose of preparing a scheme for the lay-out of property as a housing estate it is necessary or alternatively the recognised and usual practice to obtain forthwith a complete grid of levels of the property. In particular the said levels are required for the purpose of considering and preparing a system of drainage for the property. Notwithstanding the fact that the defendants received instructions as aforesaid in Mar., 1936, they failed to obtain a complete or any grid of levels of the said properties or either of them until some date after May, 1937. The plaintiff is unable to specify the exact date until after discovery.
>
> 6. On or about July 10, 1936, the defendants submitted to the town clerk of Guildford a plan of the proposed lay-out of the said Tilehouse Estate, and on or about Aug. 13, 1936, a further plan together with a request for an interim development order under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933. The said plan was disapproved by the borough council of Guildford upon the ground that main drainage was not available and notice of the said disapproval was given to the defendants by letter from the town clerk dated Sept. 30, 1936. Notice of appeal against the said disapproval was lodged with the Ministry of Health on Oct. 20, 1936. On the same date the plaintiff supplied the defendants with a report from Messrs. Burns Brothers (London), Ltd., wherein a proposal was made for discharging sewage from the said estate into a public sewer or sewers situate near the said estate by means of a pumping plant. The defendants failed to pay any or any sufficient regard to the said proposal or to consider sufficiently or at all whether cesspool drainage could be avoided by means of the said proposal or a proposal similar thereto.
>
> 7. The said appeal was accordingly prosecuted by the plaintiff in accordance with the defendants' advice and was allowed on Dec. 30, 1936, and an interim development order was issued on Jan. 27, 1937. The plaintiff on many occasions verbally informed the defendants of his desire to proceed promptly with the development of the said estates but the defendants failed until Aug., 1937, to submit the requisite plans to the borough council of Guildford for their approval.
>
> 8. By reason of the defendants' failure to consider properly or at all the possibility of installing a system of main drainage by means of pumping plant and by reason of their continued recommendation of a scheme of cesspool drainage the plaintiff was compelled to enter into an agreement dated Nov. 11, 1937, with the borough of Guildford. By the said agreement it was provided (*inter alia*) (1) that pending provision of main drainage the plaintiff should deposit a sum of £8 upon the sale of each plot of land shown on the plan annexed to the said agreement; (2) that in the event of cesspool drainage being provided for any of the said plots in respect whereof the said sum of £8 should have been paid a sum of £3 should be repaid to the plaintiff upon main drainage being provided; (3) that after provision of main drainage the plaintiff should pay to the said council a sum of £8 upon the sale of each further plot of land shown on the said plan; (4) that within 5 years from the date of the said agreement the said council should provide a main outfall sewer at a specified place and at such a depth as would effectively drain the sewers on the said Tilehouse Estate. The plaintiff will refer to the said agreement more particularly at the trial for its full terms and effect.
>
> 9. As a result of the matters hereinbefore set out completion of the purchase of the said Tilehouse Estate was postponed from Oct. 5, 1936, being the date fixed by the aforesaid contract until July 1, 1937. Further, the completion of the purchase

of the said Stoughton Farm Estate was postponed until Feb. 15, 1938. If the defendants had produced proper plans for the development of the said estates and each of them, neither of the said postponements would have occurred.

10. The plans prepared by the defendants for the purpose of constructing sewers on the said estates provided for a soil sewer to be laid beneath a road described on the said plans as Road G. The said plans were prepared without any or sufficient regard to the levels of the land included in the said estates, and the said proposed soil sewer would not have been capable of receiving sewage from a large number of houses to be erected on the said estate. A Further if the said proposed soil sewer had been constructed in accordance with the said plans, a sewer proposed to be connected therewith for the purpose of receiving sewage from houses constructed along a road marked C on the said plans could not in fact have been constructed at all.

11. As the defendants were at all material times well aware, it was in the plaintiff's interest and his express wish that construction of houses on the said estates should be begun as soon as possible. At all material times there was available a sewer B situate within a distance not exceeding 45 ft. from the southernmost boundary of the said Tilehouse Estate, which said sewer was capable of receiving drainage from 75 houses or thereabouts. The defendants failed to make any provision for using the said sewer and the aforesaid plans for the lay-out and drainage of the said estate were prepared without any regard to the existence thereof.

12. On many occasions the dates whereof the plaintiff is unable to specify he emphasised verbally to the defendants the importance of preparing the scheme for C the lay-out of the said estates in such a manner as to secure the greatest number of houses thereon. The number of houses per acre permitted for the said estates was 12. The defendants failed to provide for the erection of houses of the density aforesaid or any sufficient density. In particular in respect of an area comprising 19 acres or thereabouts and known as the Saffron Platt area the number of houses erected in accordance with the defendants' plans was 175 whereas the said area was sufficient for the erection of 228 houses. Further the total number of plots in the said estate proposed in accordance with the defendants' plans submitted D in Aug., 1937, was 781 which said number was increased in Nov., 1937, to 872. In fact the said estates were sufficient to comprise 1,140 plots or thereabouts, or, alternatively, if 5¾ acres forming part of the said estates are reserved for shops, cinemas, or church sites 1,071 plots or thereabouts.

13. By notice dated Sept. 1, 1937, the defendants were informed by the borough surveyor of Guildford that approval had been given by the borough council to a plan deposited by the defendants for the proposed lay-out of new roads and sewers on the said Tilehouse Estate. E The said approval was expressly made subject to the sizes of surface-water sewers and piping of ditches being to the borough surveyor's satisfaction. The defendants failed to make any or sufficient inquiry as to the borough surveyor's requirements and by letter dated Sept. 8, 1937, instructed Messrs. Franks Harris Brothers, Ltd., to proceed with the laying (*inter alia*) of surface-water sewers. Thereafter the borough surveyor refused to approve of the size of the said sewers and it became necessary to remove so many thereof as had already been laid. F

14. The aforesaid requirements of the borough surveyor had regard (*inter alia*) to the fact that surface water had prior to the plaintiff's purchase been drained or discharged on to the said estates from land situate on the western side of a highway known as Worplesdon Road adjoining the said estates. There was not at any material time any easement or right in the owner or occupier of the said land or in any other person or body to cause the said surface water to be drained or discharged on to the said estates. The defendants failed to make any or sufficient G inquiries as to the circumstances in which the said surface water was so drained or discharged, or to make any or sufficient endeavour to procure an alteration of the said requirements of the borough surveyor.

15. By reason of the premises the development of the said estates was seriously prejudiced and delayed and the plaintiff has suffered damage. But for the defendants' breach of duty as aforesaid it is estimated that an additional 500 houses or thereabouts could already have been erected and sold. Further the agreement referred to in para. 8 hereof and the payments thereunder could have been avoided. H The plaintiff's costs of and in connection with the appeal to the Ministry of Health could have been avoided. The cost of laying and removing the sewers referred to in para. 13 hereof amounted to £230 or thereabouts. Further the plaintiff has paid to the defendants a sum of £341 5s. in respect of the services alleged to have been rendered by them in connection with the said estates, which said sum is in the premises money thrown away.

The matters complained of in the statement of claim are substantially traversed in the defence, save that in para. 5 the defendants admit that the plan submitted by them to the town clerk was disapproved by the borough council of Guildford "upon the ground *inter alia* that main drainage was not available."

The master and the judge were of opinion that the case fell within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89 (*b*), which, in substance, replaces the Arbitration Act, 1889, s. 14, and came to the conclusion that the cause required a prolonged examination of documents or scientific or local investigation which could not, in the opinion of the court, conveniently be made before a jury, or conducted by the court through its ordinary officers. This appears to be an order, *prima facie*, well within the discretion of the judge, if there was proper material on which he could exercise it. In my view, having regard to the number of plans which may well have to be examined, and questions of a scientific nature involved in the consideration of the technique of the lay-out of the estate and of the drainage problems raised, and also the very probable need for considerable local investigation, I think that there was ample material on which that discretion could be exercised, having regard to the issues raised in the pleadings. The real ground for the appeal is that to make such an order in this case would be to work an injustice, and that, therefore, in accordance with the principles laid down in *Evans* v. *Bartlam* (1), more particularly in the *dicta* of LORD ATKIN, at p. 480 ([1937] 2 All E.R., at p. 650), and LORD WRIGHT, at p. 486 ([1937] 2 All E.R., at p. 654), to allow this reference would result in injustice. However, as LORD WRIGHT states at p. 486 ([1937] 2 All E.R., at p. 654), the Court of Appeal should not interfere with the discretion of a judge acting within his discretion unless the court is clearly satisfied that he was wrong.

The grounds here generally relied upon are apparently (i) that, the defendants being estate agents of considerable reputation, a finding of negligence in a court not generally frequented by the public would be very injurious, and (ii) that, since by the Administration of Justice Act, 1932, s. 1 (1) an appeal lies to the Court of Appeal from any decision of an official referee only on a point of law, the defendants would be precluded from seeking a review of the facts upon a re-hearing which they would be entitled to ask for, were an appeal to be lodged on a finding of fact by a judge. As to the second matter, I am not disposed to say that the judge should not have regard to the limitation of the grounds of appeal imposed by the 1932 Act. However, this matter was argued by the respondents before him for his consideration, and I have no reason to suppose that he failed to have regard to it.

As to the more general argument that a plea of negligence should be treated, as regards the question of reference, as one akin to a charge of fraud, in that, in the ordinary way, it should not be sent to the referee, the authority of *Hoch* v. *Boor* (2) seems to me to be against the defendants' contention. That case went so far as to say that, even where there were

issues involving a charge of fraud, the case might, if it be otherwise proper, be compulsorily referred, if it involved a prolonged examination of documents. Although counsel contended there, in an argument very similar to that used here, that negligence had been alleged, and that, therefore, apart from fraud, character was at stake, Brett, L.J., stating, at p. 426, that " the defendant says that while in his service the plaintiff A
misconducted himself, was negligent and incompetent," none the less the court upheld the order of the judge referring the matter to the official referee, and, though in that case the referee was to make a report to the judge, I read the judgment as of general application. Thesiger, L.J., said, at p. 427 : B

> *Prima facie* issues involving the character of the plaintiff or the defendant in an action ought not to be referred.

Nowhere is it suggested in the judgment, however, that a mere accusation of negligence as such raises any such *prima facie* presumption against C
reference. *Hoch* v. *Boor* (2) was followed in *Sacker* v. *Ragozine & Co.* (3), where also a complaint of habitual negligence in duty as well as misconduct and disobeying orders was alleged. Denman, J., said, at p. 309 :

> The law as it now exists is, I think, to be found in the case I called attention to, D
> *Hoch* v. *Boor* (2).

In *Sacker's* case (3), Pollock, B., said that the facts scarcely amounted to fraud, and, the case being therefore treated on the basis of misconduct and negligence, it was nevertheless referred to an official referee.

Generally, I see no reason why, if it is to be said that the judge was E
wrong in this case, every building contract involving accusations of negligence—and there are few which do not—in which reference was ordered should not be appealable when the judge thinks fit to refer the case for other sufficient reasons to the official referee. In my view, this appeal fails, and must be dismissed with costs. F

Clauson, L.J. : By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89, it is enacted that, in any cause or matter (other than a criminal proceeding by the Crown), if the cause or matter requires any prolonged examination of documents or any scientific or local G
investigation which cannot, in the opinion of the court or a judge, conveniently be made before a jury or conducted by the court through its other ordinary officers, the court or a judge may, at any time, order the whole cause or matter to be tried before an official referee or officer of the court. In the present action, the plaintiff claims (as appears H
from the writ and the statement of claim) damages for breach of contract, or alternatively, negligence.

The defendants are a firm of estate agents and surveyors. They were consulted as such by the plaintiff, and were instructed by him to prepare a scheme for the lay-out of certain properties as housing estates. The plaintiff alleges that it was the duty of the defendants to act with due skill and diligence, to make all proper inquiries and obtain all necessary information, and to take all proper steps to further the interests of the plaintiff in and about the development of the properties. The plaintiff further alleges that, in breach of that duty, the defendants acted A negligently and without any, or any sufficient, regard to the plaintiff's interests. The complaints as appearing in the pleadings may, for the present purpose, be sufficiently summarised as follows: (i) the defendants failed to acquaint themselves with the levels of the property, an essential preliminary to the working out of a proper system of drainage, B (ii) the defendants advised a system of cesspool drainage, and failed to consider whether cesspool drainage could be avoided by an alternative means of pumping sewage into a public sewer, (iii) the plaintiff on this account was to his detriment forced to enter into an arrangement with the local authority in regard to temporary cesspool drainage, and to the C provision by the local authority at some future time, and at some cost to the plaintiff, of main drainage facilities, (iv) owing to the defendants' action in regard to these matters, the development scheme was delayed, (v) the defendants provided for laying certain sewers which either could not be laid at all or could be laid only with disadvantage to the plaintiff, D (vi) the defendants' plans did not provide, as they should have done, for securing the greatest number of houses permitted on the property by the Housing Acts, (vii) the defendants arranged for laying certain sewers, which, as they knew, or ought to have known, would not be, and were not, passed by the local authority, and had ultimately to be removed, E (viii) the defendants failed to take certain steps necessary for enabling a proper system of surface drainage to be installed. The defendants' defence was, in substance, that the plaintiff knew throughout, and had, indeed, been informed by them, of difficulties arising or likely to arise owing to the fact that main drainage was not available, and that the F defendants had not been in any way unskilful or negligent.

Those being shortly the issues raised on the pleadings, it was proposed that an order under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89, for reference of the action to an official referee should be made, on the footing that the hearing would require a prolonged examina- G tion of documents or a scientific or local investigation which could not conveniently be conducted by the court through its ordinary officers. The pleadings were before the judge, but no evidence, and it was suggested that he should infer from the nature of the issues that the hearing would require a prolonged examination of documents, or a scientific or local H investigation which could not be conveniently conducted by the court through its ordinary officers. The master took the view that it was a case for reference to an official referee. The judge, after some consideration, took the same view. From the pleadings, I should infer that the case would involve the consideration of detailed plans of the *locus*, and of lay-out and drainage plans, possibly some expert evidence as to the recognised way of dealing with such drainage problems as arose, and a careful consideration of the bearing on the matter of the rights and powers of the local authority in regard to such matters, and possibly also in regard to the Housing Acts.

Without further evidence, I should, speaking for myself, be quite unable to hold that the plaintiff (who supports the order for a reference) had discharged the onus which lay on him of establishing that the action required a prolonged examination of documents or a scientific or local investigation which could not conveniently be conducted by the court through its ordinary officers. That the action might well last several days, and would thus be likely to hamper the progress of the non-jury list, I can well believe. If the matter rested with me, however, I should be prepared to hold that the plaintiff had failed to establish the existence of the conditions required by the relevant provisions of the Act before the matter can be compulsorily referred to an official referee, and on that ground I should allow the appeal. In my view, on an application for a compulsory reference, the judge should require to be satisfied as to what are, generally speaking, the documents which are said to require prolonged examination, and as to the nature of, and the reasons for, the prolonged examination of documents, and the scientific or local investigation which it is suggested is of such a nature that it cannot be conducted by the court through its ordinary officers—namely, in this case, a judge trying cases in the long non-jury list. I can see no material before the court on which the judge could properly come to a conclusion on these points.

As, however, I understand that my brethren consider that the plaintiff has made out his case under this head by a mere reference to the pleadings, it becomes necessary to consider whether the judge, thus finding the action to be within the class of actions which he has power to refer, made a correct order. If the matter now in question had arisen before the Administration of Justice Act, 1932, s. 1, came into force, there would be no great difficulty. The effect of the order would merely be to substitute an official referee for a judge, to the manifest relief of the non-jury list. The parties would lose the services of a judge, but would have a public hearing by an experienced officer, with the same opportunities, in case of error (to which all officers, and even judges, are liable), to have the matter reconsidered before this court. The effect of the last-mentioned section, however, is to put it out of the power of the judge to refer such a case as this to an official referee without at the same time depriving the parties of the right of appeal in case of error of fact, which they would have in the case of a trial before a judge. It is obvious that, whether or not this was the intention of the legislature, the position of a judge who is asked to order a compulsory reference in a case to which this section applies is now far more difficult than it was before the Act came into force. It is not for him a mere question of weighing up the comparative advantages of various modes of trial. He has to weigh up

the advantages of a trial before an official referee, such as that of providing a continuous, and, if necessary, local, and possibly earlier, hearing, and at the same time affording relief to a possibly overcrowded non-jury list, against the very serious circumstance that, in case of error of fact, the litigants will be without remedy. It may well be that in many
A cases, such as that of partnership and like accounts, where the errors, if any, are unlikely to be other than errors of *quantum* in regard to a few among many items, the circumstance that appeal on fact is excluded may be of comparatively small importance. Nevertheless, the circumstance must obviously be considered and weighed.

B It appears that in the present case the Administration of Justice Act, 1932, s. 1, was mentioned to the judge, but, unfortunately, this court has no information as to the reasons for his Lordship's refusal to treat the absence of a right of appeal as countervailing the advantages of a trial by an official referee.

C I entirely disclaim any intention of laying down any rule as to the weight to be attached to this factor in the mind of the judge or court which has to consider whether a case is to be compulsorily referred, with the result that there will be no appeal on error of fact. In the present case, however, the defendants are charged with dereliction of professional
D duty, due, it may be, to incompetence, or, it may be, to carelessness. The issue is not even as to the incompetence or negligence of some subordinate, for which the defendants are to be held responsible. The issue is as to the personal competence, or possibly the personal conscientiousness, of that one of the partners in this firm of professional men who had the
E business in hand. The judge, whether he realised it or not, has forced the defendants to submit this question, of the most vital importance to the firm and individual concerned, to be decided, without possibility of revision on points of fact, by an officer of the court who, if I may say so with respect, is not less likely, though I will admit not more likely, to
F err on a matter of fact than a High Court judge. The defendants are thus deprived of the protection against error to which they are by law entitled if the case comes before the normal tribunal of a High Court judge. With the fullest respect for the judge, I am convinced that his order was erroneous, and that, if it stands, the defendants will run a
G serious risk of suffering what I can only describe as an injustice. There is the highest authority for the view that, with this conviction, it is my duty to refuse to concur in supporting what is, as I am satisfied, an erroneous order. Accordingly, if the matter rested with me, the appeal would be allowed, and the judge's order reversed.

H

SINGLETON, J.: The defendants are a firm of estate agents and surveyors at Guildford. The order of TUCKER, J., against which this appeal is brought, affirmed an order of Master BALL that the case be tried before an official referee. It is clear from the statement of claim and from the defence that there are numerous questions to be tried, questions both of length and of difficulty. Furthermore, it seems to me that the case is one which involves prolonged examination of documents, and that it may well require both scientific and local investigation. I am satisfied that there were materials on which the court or judge could come to the conclusion that the trial could not conveniently be conducted through its ordinary officers. A

In such circumstances, the court or judge may at any time order the whole cause or matter to be tried before an official referee, as is provided in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89. It is to be observed that the word "may" is used. It is for the judge to consider the matter in all its bearings, and to exercise his discretion upon B the question as to whether or not he should order the case to be tried before an official referee.

Counsel for the defendants raised two points. The first was that there was no jurisdiction to make an order that the case be referred to an official referee on the materials which were before him. As to this, I C have already said that, in my view, there were materials on which such an order could be made. At the same time, I do not overlook the fact that judges try many cases of as complicated a nature as this appears to be. The second point was that in any event such an order ought not to be made, having regard to the nature of the case, which involves D various allegations against professional men, and especially so as the judgment of an official referee has been final on all questions of fact since the coming into force of the Administration of Justice Act, 1932, s. 1. Why, counsel asked, should a professional man, against whom are made charges which may ruin him, or his firm, be deprived of the right of E appeal in this way? I confess that this argument appeals to me. I hold the view that no litigant ought lightly to be deprived of his right of appeal, and that applies particularly in the case of a professional man against whom charges of negligence are made. At the same time, it is to be borne in mind that in 1932 the legislature thought it right to enact, F and did enact, that no decision of an official referee should be called in question by appeal or otherwise except on a point of law, and it can hardly be said that, by reason of that, no case involving charges against a professional man ought thereafter to be referred to an official referee for trial. G

Counsel for the plaintiff submitted that the fact that there was now no right of appeal from an official referee on questions of fact had nothing to do with this appeal, that it was the duty of the court or judge to consider whether the case fell within the words of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89, and that, if it did, it was in H the discretion of the judge to make the order independently of whether or not there was a right of appeal on questions of fact. I do not agree with this argument. I regard the cutting down of the right of appeal as one of the facts—and possibly the most important of them—which the judge must bear in mind in exercising his discretion. It was for this reason that I ventured to ask during the argument whether it was pointed out to the judge that the effect of upholding the order of the master would be to deprive the appellant of any right of appeal on fact. We were informed that, both before the master and before the judge, this point was urged. That was common ground.

After hearing the matter fully argued, I feel bound to say that I should not have made the order which TUCKER, J., made. I should have taken the view that it was on the whole undesirable to leave the defendants without any appeal on facts in a case involving many complications, even though it might appear that the case could be more conveniently tried before an official referee. That does not mean that I am of opinion that TUCKER, J., is wrong. The matter was one for the exercise of his discretion. It is not one for the exercise of my discretion. Unless we are clearly satisfied that the judge wrongly exercised his discretion, we ought not to interfere.

In *Evans* v. *Bartlam* (1), LORD ATKIN said, at pp. 480, 481 ([1937] 2 All E.R., at p. 650):

> But while the judge has such a discretion as I have mentioned, I conceive it to be a mistake to hold, as GREER, L.J., seems to do, that the jurisdiction of the Court of Appeal on appeal from such an order is limited so that, as GREER, L.J., said [in *Cooper* v. *Cooper* (4), at p. 209]: the Court of Appeal "have no power to interfere with his exercise of discretion unless we think that he acted upon some wrong principle of law." Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it.

Can it be said that the decision will result in injustice being done if it remains? If so, clearly we ought to set the order aside. The word used by LORD ATKIN is "will," not "may." I fail to see that we can dispose of this case by saying that injustice will result if the order stands. If the defendants lose in the court of first instance, and appeal to the Court of Appeal, they may still lose, and, if they succeed in the Court of Appeal, the plaintiffs in the action may appeal to the House of Lords, and may succeed. It is impossible to say that injustice *will* result by reason of the judgment of the court of first instance being final on fact in any particular case, however undesirable it may be that in an important case a litigant should be deprived of his right of appeal on fact. Moreover, one must not overlook the possibility of the defendants succeeding in the court of first instance. Indeed, trial before an official referee might turn out to be a blessing rather than otherwise, for, after the hearing before the referee, the parties will know where they stand on the facts of the case, whereas there is no finality if the trial is before a judge of the King's Bench Division.

In *Evans* v. *Bartlam* (1), LORD RUSSELL OF KILLOWEN said, at p. 482 ([1937] 2 All E.R., at p. 651):

> In the case now under discussion the judge in chambers thought it proper, in the exercise of his discretion, to set aside the judgment; and unless an appellate

court is satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way, the judge's order should be affirmed.

In the same case, Lord Wright said, at pp. 486, 487 ([1937] 2 All E.R., at p. 654):

> It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the judge had jurisdiction A and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus, in B *Gardner* v. *Jay* (5) Bowen, L.J., in discussing the discretion of the judge as regards mode of trial, says [p. 58]: "That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed."

Then he says, at p. 488 ([1937] 2 All E.R., at p. 655):

> In my opinion this House must consider, on all the circumstances of the case, the contentions on behalf of the respondent that the order of Greaves-Lord, J. C was wrong, and that on the merits the default judgment should not be set aside.

I have looked at the facts anew. I arrive at the conclusion that I should not have made the order which Tucker, J., made. I am not clearly satisfied that he was wrong, though in the exercise of my discretion I should have decided in a different way. All the relevant facts D were before him, and he considered them. At least he is as likely to exercise his discretion properly as I am. In these circumstances, I do not consider that it is the duty of this court to interfere with the exercise of his discretion by the judge. It is impossible to say that he proceeded on any wrong principle. It is equally impossible to say that injustice E will result from his order, and I am not prepared to say that he exercised his discretion wrongly simply because I should have taken a different view.

If I am wrong, and if this appeal ought to be allowed solely on the ground that by the order the defendants are deprived of any appeal on F questions of fact, it follows that, apart from consent, no case ought to be referred to an official referee which may affect a litigant in a sense other than the pecuniary sense. The effect of such a practice would clearly be to cut down very considerably the number of cases with which the official referees deal. My difficulty in this case has arisen entirely through G the Administration of Justice Act, 1932, s. **1** (1) (*b*). I can well understand the undesirability of appeals on questions of fact where accounts are being considered. There must be some finality. Nevertheless, I fail to see why the official referee, or an appellate court, should not be enabled to give leave to appeal on a question, or questions, of fact in an H appropriate case. I agree that the appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Berrymans* (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *Gilbert H. White & Co.*, Guildford (for the respondent).

[*Reported by* **Derek H. Kitchin, Esq.**, *Barrister-at-Law.*]

ENGLISH v. WESTERN.

[Court of Appeal (Slesser, Clauson and Goddard, L.JJ.), **April 29, 1940.**]

Insurance—Policy—Conditions—Policy against third-party risks—Exception—" Member of the assured's household."

A A young man of about 20 years of age was insured against third-party risks in respect of a motor car. The policy contained an exception of the " death or injury to any member of the assured's household " carried in or upon the car. A claim was made under the policy in respect of an accident to the sister of the insured at a time when the insured was living in his father's house and receiving an allowance B from him :—

Held : the exception in the policy being ambiguous, it must be construed in the sense least favourable to the insurers. Since, in one sense, the insured was not a householder, the exception did not apply and the general liability under the policy, therefore, remained. The insured was, therefore, entitled to recover.

Decision of Branson, J. ([1939] 4 All E.R. 345) *reversed.*

C

[EDITORIAL NOTE. The decision in this case tests the extent of a common exception in motor car policies, the word to be construed being the word " household." The term " householder " is commonly used to denote an occupier of premises responsible for the rent and outgoings payable in respect of them, and it is suggested that only a householder can have a household. The term " household " D was, however, given a wider significance in the court below. In the Court of Appeal the majority of the Lords Justices have adopted the view that the exception was ambiguous and, applying the rule that any ambiguity in the exception must be construed against the insurers, have held that the exception did not apply.

As to Construction of Policies, see HALSBURY, Hailsham Edn., Vol. 18, pp. 426-431, paras. 613-616; and for Cases, see DIGEST, Supp., Insurance E Nos. 3217a-3217t.]

Cases referred to :

(1) *Lake* v. *Simmons,* [1927] A.C. 487 ; Digest Supp. ; 96 L.J.K.B. 621 ; 137 L.T. 233.

(2) *Re Etherington & Lancashire & Yorkshire Accident Insurance Co.,* [1909] 1 K.B. 591 ; 29 Digest 396, *3148* ; 78 L.J.K.B. 684 ; 100 L.T. 568.

F

Appeal by the plaintiff from a judgment of Branson, J., dated Nov. 14, 1939, and reported [1939] 4 All E.R. 345. The facts are fully set out in the judgment of Slesser, L.J.

B. L. A. O'Malley (for *N. A. J. Cohen* on war service) for the appellant.

G *C. N. Shawcross* for the respondent.

O'Malley : An ordinary reasonable man reading the words " member of the assured's household " would ask himself if the insured had a household. In this case, he would answer himself in the negative. If the word " household " can mean either a household of which the insured H is the head or one of which he is a member, then it is ambiguous, and the principle *verba chartarum fortius accipiuntur contra proferentes* should be applied : *Re Etherington & Lancashire & Yorkshire Accident Insurance Co.* (2). No doubt it would be to the advantage of the insurers to extend the meaning of the words " member of the assured's household " to all members of the household of which the assured was a member. Nevertheless, they were offering to indemnify him against all claims in respect of passengers. If they had intended to cut down this advantage, they should have done so in clear and unmistakable terms. They have not done this, for the words are ambiguous. The assured was entitled to read the word " passenger " as giving him the widest possible rights, subject only to the limitation that members of the household of which he was the head were excluded.

Shawcross : On the only reasonable construction of this clause, it excludes all other members of the household of which the insured is a member. Among the reasons for inserting this clause in the policy is the fact that members of the assured's household are likely to be in the car very often, and, therefore, are likely to increase the risk to an unreasonable extent. The word " household " has been defined by standard dictionaries as " inmates of a house collectively." " A woman's household " is referred to in the Authorised Version of the Bible in such a connection that she could not be the head of it. The word " householder " is a much later word, and was imported into legal language by an early Reform Act. It is used in connection with the franchise and liability to rates, with the meaning of a person who holds a house as a tenant or owner and is not necessarily the head of the household. The rule of *contra proferentes* must not be applied so as to discover an ambiguity where none really exists : *per* VISCOUNT SUMNER in *Lake* v. *Simmons* (1), at p. 509. In any event, the words here are not ambiguous in the sense of the rule, because it is possible to construe their meaning. The rule applies only when, by all canons of construction, the words clearly have two possible meanings.

SLESSER, L.J. : The plaintiff claimed a declaration that he was entitled to be indemnified by the defendant under an insurance policy subscribed by the defendant in respect of compensation which the plaintiff might become legally liable to pay to George Robert English and Rita Elaine English in respect of an accident which occurred on May 28, 1938, while the plaintiff was driving a motorcar insured by the policy.

The defendant is an underwriter subscribing the policy, and the critical portion of the policy which has to be considered is contained in para. 5. The facts, so far as they are material, may shortly be stated thus. On May 28, 1938, the plaintiff was driving a motor car, which came into collision with another motor car of a different make from, and another car of the same make as, that which he was driving. Considerable damage was done to the cars, the plaintiff's becoming a total wreck, and a lady was unfortunately killed. The defendant, who is representing underwriters generally on the policy, and his fellow-underwriters have agreed to indemnify the plaintiff in respect of the loss of the car and various third-party claims, with the exception of a claim made in respect of injuries to Rita Elaine English, the plaintiff's sister, who was a passenger

in the plaintiff's car at the time of the accident. They are both the children of George Robert English. Both the plaintiff, who at the time of the accident was a very young man, being born in 1918, and his sister, who was born in 1920, lived with their father, George Robert English, at No. 21, Queen's Gate Place, London, and were in receipt of an
A allowance from him, paying nothing to the upkeep of the house. An action for damages was brought on Mar. 3 by the sister, Rita Elaine English, by her father, George Robert English, as next friend, against the plaintiff here, her brother. Judgment was signed in default of appearance, but the assessment of the damages was postponed by agreement
B pending the determination of this special case. The judge has held that, in construing para. 5 of this policy which has here to be considered, the words which cause the difficulty have a very definite meaning. It is necessary in the first place to read those words, and see how far one finds oneself in agreement with the judge as to the words having a
C definite meaning and having the meaning which he has ascribed to them. Paragraph 5 of the policy deals generally with third-party risks, and says this:

> All sums which the assured shall become legally liable to pay by way of compensation for (A) injury to persons, death of or bodily injury to any person
> D (including passengers) caused by or arising out of the use of the car . . .

There is a liability, therefore, generally for indemnity for death or bodily injury to any person, including passengers. This girl was a passenger in the car. If the matter stood there, there could be no question but that the insurance company would be liable. However, the words pro-
E ceed as follows:

> . . . but excluding (*a*) death or injury arising out of and in the course of employment of such person by the assured, (*b*) death or injury to any member of the assured's household who is being carried in or upon, or entering or getting on to or alighting from the car . . .

F The remaining words do not apply.

It is said by the insurance company that this exclusion of liability extends to the sister of the insured in this case, in that she is a member of the insured's household. On the other hand, it is said on behalf of the plaintiff: "No. This limit of liability applies to a member of the
G insured's household only where the insured himself is in a position to have, or has, a household in the sense that he is a householder, and, as this plaintiff was not a householder, but was living in his father's house, supported entirely by his father, the exception contained in (*b*) does not apply. Therefore, the general obligation of the insurance
H company to indemnify only in the cases stated where any persons, including passengers, have sustained bodily injury, applies to this case." BRANSON, J., has come to this conclusion ([1940] 1 K.B., at p. 148 [1939] 4 All E.R., at p. 346):

> . . . the words "member of the assured's household" mean a member of the same household as that of which the assured is a member, just as one speaks of a member of a man's college or a member of a man's club. The words are com-

> pletely apt to cover that construction. Indeed, to my mind, they seem more apt to cover that construction than any other.

Then the judge goes on to give reasons why the limitation has been so made. In my view, however, it is not right to say that those words are apt to cover that construction in the sense that they are not equally apt to cover the other construction which is contended for here by the A
plaintiff—namely, that the insured's household refers to a person capable of having a household, namely, a householder. I think that those words are equivocal. I think that they are equally capable of either construction, and, in the circumstances, I feel that the judge should have considered what principles of law he ought to have applied B
to the construction of this policy, as, no doubt, he would have done had he come to the conclusion that those words were as equivocal as I think they are. If the words be equivocal or ambiguous, then I find no difficulty for myself in ascertaining the true principle to be applied. I think that the doctrine generally known as *contra proferentes* should C
here be applied. I quote from MACGILLIVRAY ON INSURANCE LAW, 2nd Edn., p. 1029, where the authorities are conveniently set out:

> If there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases, against the company. A policy ought to be so framed that he who runs can read. A party who proffers an instrument cannot be permitted to use ambiguous words D
> in the hope that the other side will understand them in a particular sense, and that the court which has to construe them will give them a different sense, and therefore where the words are ambiguous they ought to be construed in that sense in which a prudent and reasonable man on the other side [the side by whom the policy is proffered] would understand them.

In my view, if that principle be here applied, if those words be ambiguous, one arrives at this result. There is given by the opening words of E
para. 5 a general indemnity to the insured in respect of passengers, and, if the insurance company cannot rely upon these words in the exception as necessarily including the household in the sense which BRANSON, J., has indicated—namely, that he is one member of the household which includes his sister—then I think that they are not entitled F
to adopt that favourable construction in order to exclude a construction which is said by the plaintiff to be the proper construction—namely, that this exception has no relation to his case at all, because he was not at any material time a householder, and had not a household. The exception, therefore, must be ruled out in this case, and the G
general words of liability apply. That seems to me to state the principles on which the construction of an ambiguous document should be dealt with in favour of the profferee. The result is that I come to the conclusion that BRANSON, J., was wrong, that the appeal should be allowed, and that the judgment in this case should be entered for the H
plaintiff.

CLAUSON, L.J.: I need scarcely say that it is with the utmost diffidence that, in a matter which involves a question of the construction of a policy of insurance, I find myself differing from the judgment of

Branson, J., but, as I have formed a reasonably clear opinion that his decision in this case is not correct, I will proceed to explain my reasons for so holding. A man may be related to a household in two ways. He may be a member of the household or he may be the head of the household. The insurance company, while insuring the insured against his liability to passengers, excepts in its own favour his liability to a passenger who is a member of the insured's household. The question is, accordingly, whether or not, on the true construction of the policy, the exception covers, not only the narrower class of members of a household of which the plaintiff is the head, but also the wider class of members of a household of which the plaintiff is a member. Branson, J., took the view that the more natural meaning of the phrase is covering the wider class—namely, members of the household of which the plaintiff is a member.

The question seems to me to be the relationship connoted in this phrase by the possessive pronoun which, in the actual clause, is concealed beneath an apostrophe s. It appears to me that the word "his" may equally well connote the one relation which I have stated as the other. In other words, in my judgment, either of the two competing meanings of the phrase "a member of the assured's household" is possible and natural, and, accordingly, there is, in the truest sense, an ambiguity in the phrase. There is no doubt that, if the phrase used in the policy is in this sense ambiguous, that meaning which is less favourable to the insurance company which has put forward the policy must be chosen. It may well be that one would have expected the insurance company, possibly for very good reasons, to have intended the phrase to carry the wider connotation, but that seems to me to be quite immaterial if one once reaches the conclusion that the phrase is ambiguous. If the insurance company desired the wider meaning to be placed upon it, it was their duty to make that desire clear by using unambiguous language.

For these reasons, I find myself bound to hold that the phrase of exception covers only the narrower class, the member of a household of which the plaintiff is head, and, accordingly, the case is a case outside the exception, and the company is liable. It follows, if this view be correct, that the appeal succeeds, the judgment below is reversed, and the company declared liable.

Goddard, L.J.: Though I regret that I am unable to share the view expressed by Slesser and Clauson, L.JJ., I at least have the satisfaction of finding myself in agreement with the view of Branson, J., whose judgment on these matters of insurance has always been regarded with such respect. I find his judgment so convincing that I should have been content to adopt it as my own, but I propose to add a very few words as to why I have come to a different conclusion from that at which Slesser and Clauson, L.JJ., have arrived in this court. It is true, I agree, that the words " assured's household " can be construed in one of two ways. It is also true to say that, where one finds a proviso inserted in an insurance policy for the benefit of the underwriters, if the words are ambiguous, or not clear, one is to construe those words more strongly against the underwriters than against the insured. However, the doctrine generally spoken of as a construction *contra proferentes* is A limited to this. If one can show a perfectly good reason for adopting one construction, and can show no reason, or very little reason, for construing the clause in the other way, one should prefer the construction which affords good reason for the presence of the proviso.

Then it seems to me that the reasons given by the judge are very B strong for construing it in the way contended for by the underwriter. He says, ([1940] 1 K.B., at p. 148, [1939] 4 All E.R., at p. 346):

> One can see some reason for a limitation so framed, but it is very difficult to follow the reason for a limitation such as that which the assured seeks to put on the words. It is reasonable to exclude from the benefits of a policy of this kind members of the assured's household, giving that word a meaning rather wider C than that of "family," because it must be envisaged by the underwriters that the members of a household in that sense would probably be very frequently at risk in the car and would, therefore, be people who, if they were to be covered, would normally be covered only for some additional premium.

I am reminded, too, of the words of VISCOUNT SUMNER in *Lake* v. *Simmons* (1), at p. 509: D

> Every one must agree that commercial contracts are to be interpreted with regard to the circumstances of commerce with which they deal, the language used by those who are parties to them, and the objects which they are intended to secure.

We are here dealing with an insurance in which the insurers are willing to give the insured an indemnity greater than that which he is obliged E by statute to procure for himself—in other words, an indemnity against claims which may be made against him by passengers in his car, who may be injured and allege that they were injured by the driver's negligence. However, the underwriter is not content to give an unlimited cover. It seems to me that the object of this proviso is to prevent F underwriters from being exposed to the risk of claims by people who may be expected to be very frequent passengers in the car. To construe it in the way contended for by the insured seems to me to lead to the curious result that, if the father has a car and the son has a car, and each is insured by separate policies, the son gets a far wider cover than the G father would get. I cannot think that that was intended. In my opinion, the words " assured's household " in this policy, when one bears in mind the object with which the proviso was inserted, are meant to exclude from the benefit of the policy the members of the common establishment in which the insured lives. For these reasons, I would H dismiss the appeal.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Edward Betteley, Smith & Stirling* (for the appellant); *William Charles Crocker* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

DORMER AND OTHERS *v.* NEWCASTLE-UPON-TYNE CORPORATION.

[COURT OF APPEAL (Slesser, Clauson and Goddard, L.JJ.) **April 30, 1940.**]

Public Authorities—Statutory powers—Erection of barrier along pavement in front of plaintiffs' building—Nuisance—Invasion of private rights of property—Newcastle-upon-Tyne Improvement Act, 1865 (*c. ccl*), *ss.* 22, 65.

The defendant corporation had erected a barrier, consisting of posts and rails, along the edge of the pavement in front of a block of shops and offices owned by the plaintiffs, with the object of providing that persons walking on the pavement should, when wishing to cross the street, use the pedestrian crossing at either end of the barrier. The barrier constituted a nuisance and a serious invasion of the plaintiffs' right of access to the carriageway of the street. The corporation had been empowered by sect. 22 of their private Act to place posts, pillars, rails, etc., in the streets for, *inter alia,* the protection of passengers and traffic, but sect. 65, which was one of a number of sections under a general heading " Sewers. Sanitary Arrangements," contained a proviso that " nothing in this Act shall authorise the corporation . . . to do . . . any act . . . amounting to a nuisance." It was contended that sect. 65 prevented the corporation from exercising their powers under sect. 22 so as to commit a private nuisance :—

HELD : (i) sect. 65 did not in any way qualify the power given to the corporation under sect. 22 to place posts, rails, etc., in the street regardless of whether or not they thereby caused a public or private nuisance.

(ii) the word " nuisance " in sect. 65 was not restricted to a private nuisance.

(iii) *per* GODDARD, L.J. : the extent of the railing along the street was a question entirely in the discretion of the corporation, and one which could not be reviewed by the court.

Decision of WROTTESLEY, J. ([1940] 1 All E.R. 219) *reversed.*

[EDITORIAL NOTE. It has been thought necessary for the safety of the public to erect railings at the edge of the footpath to ensure that pedestrians cross the road by the pedestrian crossing. The railings necessarily restrict the access to the carriageway from business premises, and it is here held that the statutory powers of the local authority were sufficient to justify the erection of these rails, irrespective of the question whether they were a public or a private nuisance. In construing the private Act here in question, which was divided into parts by italicised headings, the court has confined the operation of a restrictive clause to the part of the Act within one such heading.

AS TO PERMISSIVE AUTHORITY, see HALSBURY, Hailsham Edn., Vol. 26, pp. 259, 260, para. 573 ; and FOR CASES, see DIGEST, Vol. 38, pp. 21-31, Nos. 112-175.]

Cases referred to :

(1) *Vernon* v. *St. James, Westminster, Vestry* (1880), 16 Ch.D. 449 ; 38 Digest 232, *620* ; 50 L.J.Ch. 81 ; 44 L.T. 229.

(2) *Goldberg & Son, Ltd.* v. *Liverpool Corpn.* (1900), 82 L.T. 362 ; 38 Digest 29, *161.*

(3) *R.* v. *Dibdin,* [1910] P. 57 ; 42 Digest 660, *689* ; *sub nom. R.* v. *Dibdin, Ex. p. Thompson,* 79 L.J.K.B. 517 ; 101 L.T. 722 ; *on appeal, sub nom. Thompson* v. *Dibdin,* [1912] A.C. 533.

(4) *Cohen* v. *South Eastern Ry. Co.* (1877), 2 Ex.D. 253 ; 8 Digest 56, *368* ; 46 L.J.Q.B. 417 ; 36 L.T. 130 ; *affg.* S.C. *sub nom. Cohen* v. *Great Eastern Ry. Co.* (1876), 45 L.J.Q.B. 298.

(5) *R.* v. *Newark-upon-Trent (Inhabitants)* (1824), 3 B. & C. 59; 42 Digest 659, *679.*

(6) *A.-G.* v. *Leeds Corpn.* (1870), 5 Ch. App. 583; 38 Digest 47, *276*; 39 L.J.Ch. 711.

APPEAL by the defendants from a judgment of WROTTESLEY, J., dated Dec. 21, 1939, and reported [1940] 1 All E.R. 219, where the facts A are fully set out.

Rt. Hon. Sir William Jowitt, K.C., and *G. D. Squibb* (for *A. Capewell* on war service) for the appellants.

Cecil R. Havers, K.C., and *C. E. Rochford* for the respondents.

B

SLESSER, L.J.: The plaintiffs claimed a declaration that the defendants had:

> . . . no lawful right to erect and have no lawful right to maintain guard rails on the pavement in Blackett Street, Newcastle-upon-Tyne . . . so as to interfere with the private rights of the plaintiffs or any of them to free access to the said street or with the public rights of the plaintiffs or any of them to an unobstructed way C across the pavement [in front of Grainger House] . . .

They also claimed a mandatory order for the removal of the guard rails, and an injunction restraining the defendants from:

> . . . erecting or continuing to erect guard rails in the said street and in front of Grainger House aforesaid so as to be a nuisance to the plaintiffs or any of them D [and damages].

In Aug., 1938, the defendants, purporting to exercise their powers under the Newcastle-upon-Tyne Improvement Act, 1865, s. 22, placed guard rails in front of Grainger House in the highway between the pavement and the roadway. The guard rails, which existed for a distance E of about 138 ft., were erected to protect passengers and traffic and to render the crossing less dangerous to passengers. This is a dangerous crossing in a densely populated part of Newcastle. The fences which have been put up appear to be efficacious to canalise the traffic going across the road so that it will not spread throughout this dangerous area. F

In answer to the allegation that a nuisance, public or private, has been created by their act, the defendant corporation rely upon the powers which they say are given to them under the Newcastle-upon-Tyne Improvement Act, 1865, s. 22, which provides as follows:

> The corporation may continue, or from time to time place and maintain, in any G street any posts, pillars, rails, bars, chains, or other fence, permanent or temporary, for the protection of passengers and traffic, and for preserving any footway clear from annoyance, and for prevention of accidents, and may place posts in the carriageway of any street so as to make the crossing thereof less dangerous to passengers, and may place fountains in convenient parts of the footways or carriageways of streets.

At the side of that provision there is inserted in italics the word "Streets." H It extends from sect. 22 over a considerable number of sections, so that it is clear that streets are the subject-matter of those provisions. Actually, it extends to sect. 61, after which a new subject-matter, indicated by the words "Sewers. Sanitary Arrangements" in italics, begins at sect. 62.

I entertain no doubt that, had there been nothing more than sect. 22 in this Act dealing with this question, the corporation, in putting up these railings, would have been acting within their powers. It seems to me that the effect of the exercise of those powers must necessarily be to create a situation which would otherwise constitute a nuisance, whether it be public or private. The maintenance in a street of posts, pillars, rails and fences must constitute an obstruction to the highway and an obstruction to those whose property is adjacent to the highway. As COTTON, L.J., pointed out in *Vernon* v. *St. James, Westminster, Vestry* (1), at p. 468:

> If it could be made out that such an erection, wherever placed and however guarded, must of necessity be a nuisance, then it would be true that the Act of Parliament had authorised a nuisance, and the court could not have interfered . . .

The judge here has found in addition that this erection did not, in his view, constitute an unreasonable use of the powers of the corporation entitling the court to interfere. In my view, that is the only possible conclusion which could be reached in this matter.

It may be that, if a council do not exercise their powers *bona fide*, as was indicated in *Goldberg & Son, Ltd.* v. *Liverpool Corpn.* (2), at p. 364, the court would interfere, but, once it is found that the discretion of the corporation to carry out the duties or powers imposed on them under sect. 22 has been, not corruptly, but unimpeachably, carried out, then it is for them to decide the nature of the post or fence necessary to render the crossing of the street less dangerous to passengers. It follows, therefore, by the nature of the case, as I have said, that, if the matter ended with the powers given by sect. 22, the acts of the corporation, albeit they would constitute a nuisance were it not for those powers, are expressly authorised by the legislature, and, being so expressly authorised, the question of the manner of their exercise so as to cause a nuisance scarcely arises. One example, and a very familiar example, of a public nuisance is that of obstructing the highway or making it less commodious for traffic. So also the obstruction of a highway may cause special and peculiar damage to an individual, or may create a nuisance in the sense of obstructing some right of access. In all these cases, I think that sect. 22 has expressly authorised the corporation to do the very matter which is complained of as a nuisance.

The matter does not end there, however, because reliance is placed by the respondents upon sect. 65 of the same private Act. Sect. 65 is the part of the Act following the *fasciculi* of sections dealing with streets, which is indicated, as I have said, by the italicised heading at sect. 62: "Sewers. Sanitary Arrangements." Sects. 62, 63 and 64 deal respectively with the power to construct sewers, the power to construct works for the utilisation of sewage, and the power to contract for the utilisation of sewage. Sect. 65, which we have here to consider, provides as follows:

> Provided always, that nothing in this Act shall authorise the corporation or any lessee of the corporation to do or be party to any act or thing amounting to a nuisance.

The judge, though the matter was not very completely argued before him, and was reserved for argument in this appeal, has taken the view that those words, properly construed, are repugnant to the language of sect. 22, in that they are purporting to say that nothing in the Act shall authorise any act or thing amounting to a nuisance, whereas sect. 22 by its very nature authorises many things which would amount to a nuisance. If A that view is adopted, then I think certain difficulties which pressed the judge might well arise. In my view, however, there is no such inconsistency or repugnancy when sect. 65 is rightly construed. It is to be observed in the first instance that sect. 65 operates by way of a proviso. As I have said, it is a proviso to the group of sections dealing with sewers B and sanitary arrangements. It has been said by **Fletcher Moulton**, L.J., in *R.* v. *Dibdin* (3), at p. 125:

> It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on C the main enactment.

If the main enactment here be, as I think it is in this matter, an enactment relating to sewers, then it is clear, to my mind, that the proviso is limited to those potential nuisances which may arise out of the exercise of the powers in sects. 62, 63 and 64, which, unlike the powers in sect. 22, D can be exercised without creating a nuisance.

Another reason for coming to the conclusion that the provision is so limited was indicated by **Clauson**, L.J., in the argument. The proviso is not only directed to the corporation, but also provides:

> . . . nothing in this Act shall authorise the corporation or any lessee of the corporation to do or be party to any act or thing amounting to a nuisance. E

The consideration of the insertion of the words "any lessee" is very material in dealing with sect. 64, which contains the power to contract with other persons for the utilisation of sewage, and deals with the obligation of disinfecting the sewage and/or leasing any land belonging F to the corporation. It brings the lessee immediately within the ambit of this section dealing with the power to contract for the utilisation of sewage. On the face of it, it has no meaning or relation to the power in sect. 22 to set up posts for guarding footways. It is another indication that sect. 65 is so limited. Again, I think it would be wrong to take the G view that sect. 65 was anything other than a limitation of the power otherwise given in the sections dealing with sewers if consistent sense can be made of the provision without introducing an absurdity.

There are other reasons which bring one to the same conclusion. Sect. 160 is dealing with what are called miscellaneous provisions. H There one would expect to find some general enactment applying to all the provisions of the Act, but we find in fact that this proviso as to nuisance is not placed there, but in a section dealing with sewers. Moreover, by sect. 187, it is provided that certain clauses of the Towns Improvement Clauses Act, 1847, are incorporated with the Act. Many of those (with which I need not here deal) must, if exercised, inevitably cause nuisances, public or private, to the persons whose rights would be invaded by the exercise of the powers dealing with all kinds of matters, sewers, streets, cellar-flaps, buildings, footways, removal of nuisances, and many other things. It would stultify the whole operation of this Act were it to be held that powers which can only be exercised by causing what at common law would be nuisances could not be exercised by reason of sect. 65, and I, for one, repudiate the suggestion that this Act requires any such absurd interpretation.

There is ample authority for the view that one is entitled to have regard, not only to the subject-matter preceding the proviso, but also to the *indicia* afforded by the arrangement of the sections, and from other indications, as is pointed out—and, I think, correctly—in CRAIES ON STATUTE LAW, 4th Edn., p. 190 :

> It was at one time supposed that courts of law would not recognise the division into parts or the headings as substantive parts of the Act. But they are gradually winning recognition as a kind of preamble to the enactments which they precede, limiting or explaining their operation.

It is pointed out in the same work that the method of dividing words into sections is comparatively recent, dating from 1850. Before that time, it was usual to preface each distinct portion of the Act by words indicating that the division into sections had no legislative authority. As MELLISH, L.J., pointed out in *Cohen* v. *South Eastern Ry. Co.* (4), at p. 260 :

> If some absurdity or inconvenience followed from holding it to apply to the whole Act, it might be reasonable to confine the incorporation to clauses relating to some particular subject-matter . . .

That, I think, is what is asked to be done here. Finally, on this matter I would cite a passage from the judgment of HOLROYD, J., in *R.* v. *Newark-upon-Trent (Inhabitants)* (5), at p. 71 :

> Then follows the proviso upon which the present question arises, and which is printed as part of the second section ; but whether it be printed as part of the second section, or had been separated from it by the printer, and made into a third section, can make no difference in the construction of the statute ; for in the construction of a statute, the question whether a proviso in the whole or in part relates to, and qualifies, restrains, or operates upon the immediately preceding provisions only of the statute, or whether it must be taken to extend in the whole or in part to all the preceding matters contained in the statute, must depend, I think, upon its words and import, and not upon the divisions into sections that may be made, for convenience of reference in the printed copies of the statute. The same construction must prevail, I apprehend, in this case, as if the proviso, which has been printed as if incorporated in the second section . . .

Therefore, as I see it, having regard to the context and the mischief, in case of any possible ambiguity, it is a matter of construction to consider what is the meaning of the proviso. As I have indicated, in my view it is limited to the case of possible nuisances which may arise by the exercise of powers under that part of the Act which is dealing with sewers and sanitary arrangements.

The only other matter which remains for consideration is the distinction which the judge, being faced, as he thought, with an apparent repugnancy and absurdity, sought to make between public and private nuisances.

If sect. 65 had not the meaning which I am inclined to attach to it, for myself, I see no reason for restricting the word "nuisance" to a private nuisance. It seems to me that, if it is to operate so as to forbid a nuisance, there is no reason why we should introduce, by words which are not there, a limit to the type of nuisance to which it should refer. In other words, I think that, strictly applied, if it is to be applied generally to sect. 22, it would stultify all those acts done under sect. 22, whether they produce a public or a private nuisance The class of case to which the judge refers seems to me, with every respect to him, not to be in point here. Those cases are dealing with matters, as was pointed out in *A.-G.* v. *Leeds Corpn.* (6) by Lord Hatherley, L.C., at p. 593, which they would be at liberty to do, such as draining into a river without creating a nuisance.

The question may always arise in those classes of cases which have come before the court, where an authority, being given power by statute to do a thing, has done it in such a way as to injure the property of another, or create a public nuisance, or where it has not acted reasonably. Here, however, the obligation seems to me to be absolute. In those circumstances, were I to come to the conclusion, which I do not, that sect. 65 was to be read with sect. 22, I should have come to the conclusion that acts done under sect. 22, and which produced any nuisance, would, by reason of the wording of sect. 65, not be authorised, and, therefore, would be unlawful, and that, unless the corporation could find some way of placing in the carriageway or footway posts, pillars, rails, bars, chains, or other fence which would not constitute a nuisance, they would be acting unlawfully. Directly their acts constitute a nuisance, whether it be a public or whether it be private, equally they would be doing something under sect. 65 for which they had no authority. I see no reason for distinguishing in this context between public and private nuisance. In my opinion, however, the question does not arise, because I do not think that sect. 65 in any way qualifies the power which the corporation have under sect. 22 to set up posts and the like regardless of whether or not so doing causes a public or private nuisance. For these reasons, I think that this appeal succeeds.

Clauson, L.J.: I am of the same opinion. Sect. 65 of the private Act is not to be read as a proviso to sect. 22, and I am content to rest my opinion on the grounds which have been stated by Slesser, L.J.

Goddard, L.J.: I agree. In justice to the judge, from whom we are differing, I desire to say that it seems to me that before him counsel who then represented the defendants did not really put forward, or at any rate did not insist upon, the point which is really the most complete defence to this action. That does not prevent us from dealing with it, as it involves the consideration and application of an Act of Parliament, and counsel now representing the defendants put it in the forefront of his argument.

I think that it is beyond argument that sect. 65, being, as it purports to be, a proviso, is a proviso only to the section dealing with sewers immediately preceding it, and was never intended to be applicable to the whole Act. If it were applied to sect. 22, it would simply mean that Parliament had given with one hand what it took away with the A other. The judge, being apparently invited to treat the section as applicable to the whole Act, had to see if he could reconcile the sections, and did so by differentiating between a public and a private nuisance, holding that the section did not authorise a private nuisance, though it did authorise a public one. I confess, however, that I know of no B principle on which this construction could be supported. However, I need not consider his reasons, because, in my opinion, it is clear that sect. 65 is not a proviso to sect. 22.

Then it was sought to be argued that this court could consider whether the corporation had exercised the powers conferred by the Act reasonably C or unreasonably. Apart from the fact that the judge has distinctly thought that it was a reasonable exercise of the power, let me consider what the power is. It is a power to place railings, fences, and so forth, in a street to ensure the safety of the public. Of course, if, in the exercise, or purported exercise, of that power, the corporation put up a close-D boarded fence 10 ft. or 12 ft. high along the edge of the path, it might very well be that the frontagers whose light was interfered with could say: "This is not the sort of thing which Parliament ever intended that you should have the right to do. It is not an exercise of the powers which have been given to you, because, while you are purporting to E exercise that power, in fact you are doing something entirely different." In this case, it is merely a question of whether or not the railing which the corporation put up, which no one suggests is not a proper railing for the purpose of affording protection to foot passengers, should extend for a particular distance. The plaintiffs do not like it extending in F front of their shop. The corporation, in the exercise of their discretion, came to the conclusion that it was necessary for the protection of the public in Newcastle that it should. I do not think that this court, or any other court, has any right to canvass the decision of a local authority on a matter of that sort, which Parliament has placed in their hands G for decision. It is not a question of whether the Ministry of Transport or the police or the watch committee or anybody else took this view or that view. It is entirely a question for the corporation as a corporation to decide, and their decision on the length or extent of this fence cannot be reviewed by this or any other court.

H *Appeal allowed with costs. Leave to appeal to the House of Lords.*

Solicitors: *Collyer-Bristow & Co.*, agents for *John Atkinson*, Town Clerk, Newcastle-upon-Tyne (for the appellants); *Dawson & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

ROUSOU *v.* PHOTI (GORT ESTATES CO., THIRD PARTY).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **April 29, 1940.]**

Landlord and Tenant—Repair—Undertaking implied by statute—Rent not exceeding £40 *per annum—Whether inclusive or exclusive rent—Housing Act,* 1936 (*c.* 51), *s.* 2.

A part of a house was let to the respondent at 17*s.* 6*d.* per week. The corresponding annual net rent would have been £45 10*s.* The landlord paid all rates and taxes, which admittedly were more than £5 10*s.* The respondent sublet one room to the plaintiff who was injured by a fall of the ceiling in that room. The plaintiff brought an action to recover damages, and the respondent's landlord was added as a third party. The appeal raised the question as to whether or not this was a letting at a rent not exceeding £40 per annum within the meaning of the Housing Act, 1936, s. 2 :—

HELD : the word "rent" in the Housing Act, 1936, s. 2, does not mean the net rent, but means the actual contractual rent paid by a tenant to his landlord, irrespective of whether the rates are paid by the landlord or by the tenant.

Decision of ATKINSON, J. ([1939] 4 All E.R. 616) *reversed.*

[**EDITORIAL NOTE.** The only question arising in this case is whether, upon a proper construction of the statute, the word "rent," as used in the section of the statute to be construed, means the actual rent contracted to be paid or whether an adjustment had to be made in respect of the rates which the landlord had contracted to pay. The decisions in the court of first instance had construed the section as meaning the net rent, and this would have equalised the position of tenants paying an inclusive rent and that of those who were themselves discharging the rates. The present decision of the Court of Appeal, overruling those decisions, puts it within the power of the landlord in many cases to avoid the statutory liability to repair by insisting upon an inclusive rent.

AS TO IMPLIED UNDERTAKING TO REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 204, 205, para. 223 ; and FOR CASES, see DIGEST, Vol. 31, p. 181, Nos. 3158-3160.]

Cases referred to :

(1) *Sheffield Waterworks Co.* v. *Bennett* (1872), L.R. 7 Exch. 409 ; 43 Digest 1088, *209* ; 41 L.J.Ex. 233 ; 27 L.T. 199 ; *affd.* (1873), L.R. 8 Exch. 196 ; 42 L.J.Ex. 121 ; 28 L.T. 509.

(2) *Smith* v. *Birmingham Corpn.* (1883), 11 Q.B.D. 195 ; 43 Digest 1088, *210* ; 52 L.J.M.C. 81 ; 49 L.T. 25.

(3) *Jones & Jones* v. *Nelson*, [1938] 2 All E.R. 171 ; Digest Supp.

APPEAL by the third party from a judgment of ATKINSON, J., dated Dec. 15, 1939, and reported [1939] 4 All E.R. 616, where the facts are fully set out.

G. F. Kingham for the appellant.

J. T. Molony for the respondent.

Kingham : The appellants' contention is that the word "rent" in the Housing Act, 1936, s. 2, has its ordinary meaning of a money payment by a tenant to a landlord for the letting of the premises. It does not mean the net annual value after deduction of the rates from an inclusive rent. If the Act does not apply to weekly tenancies, the respondent cannot be liable. [He was stopped by the court.]

Molony: The class of house to which the Act was intended to apply consists of houses which, for the most part, are let on weekly tenancies. The difference in the phraseology in the Rents Restriction Acts and the Housing Act is significant. It is in the interest of the tenant that the limit under the Rents Restriction Acts should be as high as possible. In the case of the Housing Act, however, the benefit lies in the opposite direction. *Smith* v. *Birmingham Corpn.* (2) is authority for saying that, when one is trying to find out whether or not a particular letting comes within the Act, one has to allow for the fact that there are periods in which the landlord receives no weekly rent. Whether or not a house is within the Act cannot depend upon whether it has been let at an inclusive rent. There should be a test applicable to all cases. A uniform test should be established throughout a district. The usual deductions must be made before one can arrive at the meaning of the word " rent " in the Housing Act. [Counsel referred to *Sheffield Waterworks Co.* v. *Bennett* (1) and *Jones & Jones* v. *Nelson* (3).]

SIR WILFRID GREENE, M.R.: This appeal raises a short but important point upon the true construction of the Housing Act, 1936, s. 2, which is enacted by the legislature for the protection of persons in comparatively modest circumstances occupying houses or parts of houses. The important words are these:

> (1) In any contract for letting for human habitation a house at a rent not exceeding (*a*) in the case of a house situate in the administrative county of London, £40 . . . there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation . . . (3) . . . the expression " house " includes part of a house.

The precise machinery by which the legislature has given this protection to tenants of the class contemplated is the familiar one of writing into a contract an obligatory term. In order that the section may be complied with, there must first of all be produced by the person claiming its protection a contract, and that contract must be of a specified character. It must be a contract for letting, it must be a contract for letting for human habitation, and it must be a contract for letting at a rent not exceeding the sum stated. When such a contract is produced, the section provides that in it there must be deemed to be included the condition and undertaking with regard to the repair of the premises. If no such contract is produced, or if the contract produced is not of that character, the condition and the undertaking are not written in.

In the present case, the contract between the appellants, the third party in the action, and the defendant was a verbal contract to let the second floor, which I think consists of two rooms, of No. 27, Stephen Street, Tottenham Court Road, at 17*s.* 6*d.* per week. There was no written contract, but there was the usual rent-book, in which the payments were entered as they were made. It appears that the defendant has been in these rooms for some 3 years, paying a rent of 17s. 6d. per week.

The first question which arises is whether or not that contract so produced by the defendant is a contract of the kind specified in the section. The only matter of doubt which arises at the outset lies in the circumstance that, the letting being a weekly letting, the rent is a weekly rent. Accordingly, one does not find in the contract a rent of £40 per annum so expressed. It might be argued—and counsel for the appellant quite rightly did not give up the point—that the section does not apply at all to houses which are let at something other than an annual rent. The judge did not accept that view, and I can see difficulties in the way of taking that view. If that view were accepted, the section would fail to give protection to a vast number of persons for whom such protection was eminently desirable. As at present advised, I see no reason to differ from the view taken by the judge upon that point, but, having regard to the fact that we have not had it fully argued, I do not propose to do more than to assume (because it is an assumption) in favour of the defendant that his contract is one to which the section is capable of applying, notwithstanding that it is a weekly tenancy, and that the rent is a weekly rent.

The defendant, having got so far, must now satisfy the provisions of the section in the matter of quantum. He must show that his rent does not exceed £40. The rate of his rent, translated into terms of a yearly rent, would be £45 10*s*. It seems to me—in the first instance, at any rate—that this is the proper sum which the contract should be deemed to provide by way of rent. I say in the first instance, because there is a point about it which I shall have to mention later. It is said by the defendant that though £45 10*s*. is the contractual rent, nevertheless it is not the rent within the meaning of the section, because there should be deducted from it a sum in respect of rates. For the purposes of argument, it was agreed below that, if any such deduction ought properly to be made for the purposes of the section, the sum of at least £5 10*s*. ought to be deducted. The result of that would be, if the defendant's argument was right, to make the section applicable to the case. Atkinson, J., took the view that the word " rent " in the section does not mean what it says—namely, rent—but means annual value. Accordingly, he held that, where one finds a tenant paying what is sometimes called an inclusive rent—that is to say, paying rent and leaving the landlord to bear the rates—the test is to be, not the sum paid by the tenant, but some other sum, to be ascertained by deduction from that of whatever is the fair and just apportionment in respect of rates for the part of the premises which he occupies, if he has indeed occupied part only. With all respect to the judge, I cannot accept the view he took of the construction of this section. The section requires the existence of a contract. The rent referred to in the section appears to me to mean, and to mean only, the rent payable by virtue of that contract by the tenant to the landlord. I can see no justification for dissecting that contractual payment and attributing part of it to something which is called the annual value of the house, or of part of the house, and the rest of it to rates, or an apportioned sum in respect of rates. It seems to me that the legislature, for reasons no doubt thought good by it, has taken a simple and clear test about which nobody could be confused—namely, the actual contractual rent paid by the tenant to the landlord.

It is said, and said with some force, that that may lead to anomalies. One may find cases of lettings where the landlord pays the rates and cases of lettings where the landlord does not pay the rates. If the true view is that this section applies to weekly tenancies (of which there are an enormous number all over the country), not merely of houses, but also of parts of houses, it appears to me to be quite incredible that the legislature should have laid down a test in terms with regard to contractual rent which can only be applied after one has gone through the process, which may be elaborate and difficult, of estimating the proper proportion of the rates to be attributed to one room, or to two rooms, or to three rooms, or to three rooms and the use of a bathroom, or in all the various complications which one could have. The test adopted by the legislature has the advantage of being a simple one, and, in my opinion, that is what the section means.

The judge relied upon two cases, the principal one being *Sheffield Waterworks Co.* v. *Bennett* (1), in the Court of Exchequer, and the other being *Smith* v. *Birmingham Corpn.* (2). Both cases involved the construction of a section dealing with a water rate. In *Sheffield Waterworks Co.* v. *Bennett* (1), the water-rate fell on every occupied house, whether occupied by a freeholder or by a leaseholder. The quantum of rate was to be fixed in accordance with the relevant section of the company's private Act:

> . . . at the following rate per annum, that is to say, where the rent of such dwelling-house or part of a dwellinghouse shall not amount to £7 per annum, at a rate not exceeding £6 per cent. per annum on such rent, . . .

It is to be observed that in that case, as in *Smith* v. *Birmingham Corpn.* (2), there is no reference in the section at all to any contract between the parties. In other words, the rent referred to is not necessarily, so far as language goes, something which is fixed by contract, because the statute does not direct one in terms to look at the contract between landlord and tenant, and for this very good reason. In the case of water rate payable by a freeholder, as by a leaseholder, if one had to refer to a contract between landlord and tenant, the freeholder would pay no water rate at all. Accordingly, it was held by the Court of Exchequer in *Sheffield Waterworks Co.* v. *Bennett* (1), later followed by the Court of Queen's Bench in *Smith* v. *Birmingham Corpn.* (2), that it was possible there to construe the word " rent " as meaning annual value. It was a decision which was easier to reach in those cases, although even in those cases it was recognised as difficult, by virtue of the circumstance which I have mentioned—namely, that to construe the word " rent " as meaning the contractual rent payable under a lease or tenancy would have left out the freeholder altogether. On balance, the courts, on the construction of those particular Acts, and on the scope and intention of those particular Acts, succeeded in construing the section in that way.

The present case, if I may say so with all respect to the judge, is an example of the danger of construing words in one context in one Act of Parliament directed to one particular object by reference to decisions on different words in different Acts of Parliament directed to different objects. My respectful criticism of the judge's approach to this question is that, instead of going to the language of the section and analysing it and construing it, he allowed his mind to be affected by these earlier authorities, which, as I have said, are dealing with quite a different matter, expressed in quite different language. I do not find any such embarrassment in those authorities as would prevent my taking the view which I take. Accordingly, in my opinion, the word " rent " in this section means contractual rent, and no deduction falls to be made in respect of rates and taxes, or anything else.

That still leaves one point, which is this. It is said that, on the assumption that the section applies to weekly tenancies, it is not proper to take the weekly rent and multiply it by 52, because, in order to translate a weekly rent into the terms of an annual rent, one must allow for periods during which the house or part of the house may stand empty without any tenant. So far as the present case is concerned, it is not necessary to answer that particular question, for the simple reason that, if that argument be right, and if a different multiplier ought to be applied, it would be for the defendant to show what the proper multiplier is. I say that for this reason. The person relying on the section must come to the court with a contract in his hand (figuratively speaking, if it is not a written contract) at a rent of the amount specified. If, therefore, his contract is at a weekly rent, and if he says that one must multiply that by something less than 52, it is for him to show what the true annual rent is, having regard to the sum paid per week. What that might be might vary in different neighbourhoods and in different streets, and would be a matter for evidence.

Accordingly, it is sufficient to say in the present case that, in the absence of any evidence whatever which would justify taking some figure other than 52 as the multiplier, the court would not be justified, in my opinion, in drawing any inferences, or proceeding on any assumptions. Accordingly, it is sufficient to say here that the defendant has not brought himself within the language of the section. I purposely do not express any view as to whether or not there is something in the contention that, given proper proof of the facts, some multiplier other than 52 in certain cases might be taken. I should prefer to leave that open, as it has not been fully argued before us. It has been argued on one side only, and, therefore, it would not be proper to express any opinion about it. In the present case, it is enough to say that, even if one assumes that that be right, the defendant, the present respondent, does not obtain any advantage from it. In the result, the appeal must be allowed, and the order of the judge must be varied accordingly.

SCOTT, L.J.: I agree entirely, and would only add that, if a case should arise where the conversion of a weekly rent into an annual figure becomes relevant, the analogy of rating practice, explained for example, in RYDE ON RATING, 6th Edn., p. 198, would probably be in point.

MACKINNON, L.J.: I agree, and I do not think that I need add anything.

Appeal allowed with costs.

Solicitors: *Walfords* (for the appellant); *Leonard Kasler* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

GOODIER *v.* COOKE.

[COURT OF APPEAL (Slesser, Clauson and Goddard, L.JJ.), **May 3, 1940.**]

Landlord and Tenant—Rent Restriction—Actual possession by landlord—Key handed over to landlord's agent—Intention to decontrol—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), *s.* 2.

At the time when a house was admittedly a controlled house, the tenant intimated to the agent of the landlord that she wished to give up possession and that another person whom she had found was prepared to take possession of the house. The agent signified that the landlord was willing to accept the proposed new tenant at an increased rent. The agent attended at the house on a Saturday, received the key from the outgoing tenant, and handed it to the incoming tenant, although in fact the outgoing tenant remained in possession till the following Wednesday. The agent said that, in receiving the key from the outgoing tenant, he "intended to decontrol." The county court judge found as a fact that the intention in the delivery of the key to the agent was to give possession to the landlord:—

HELD: the landlord had come into actual possession of the house, and it was, therefore, decontrolled.

[EDITORIAL NOTE. The Act of 1923 expressly excludes a change of tenancy made with the consent of the landlord from operating as a decontrol, but the cases decided on the section have clearly determined that the obtaining of actual possession by the landlord is purely a question of the intention, to be ascertained from the facts. It may have been doubted whether a momentary possession of the key by the landlord or his agent, such as is here disclosed, is a sufficient possession to be a resumption of actual possession by the landlord within the Act. It is here held that it is sufficient, so long as it is found, upon the facts, that there was an intention to resume actual possession.

AS TO DECONTROL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 318-321, paras. 378-380; and FOR CASES, see DIGEST, Vol. 31, pp. 585, 586, Nos. 7349-7361.]

Cases referred to:

(1) *Holt* v. *Dawson*, [1939] 3 All E.R. 635; Digest Supp.

(2) *Jewish Maternity Home* (*Trustees*) v. *Garfinkle* (1926), 95 L.J.K.B. 766; 31 Digest 558, *7051.*

(3) *Thomas* v. *Metropolitan Housing Corpn., Ltd.*, [1936] 1 All E.R. 210 ; Digest Supp.

(4) *Hall* v. *Rogers* (1925), 133 L.T. 44 ; 31 Digest 558, *7049*.

APPEAL by the defendant from a judgment of His Honour JUDGE F. R. BATT given at Salford Hundred Court of Record on Dec. 7, 1939. The facts are fully set out in the judgment of SLESSER, L.J. A

N. H. Lever for the appellant.

H. Burton for the respondent.

Lever : The landlord could not have intended to obtain actual possession. The presence of the sitting tenant and her intention, known by the landlord and agreed to by him of staying until the following B Wednesday with her furniture, made it clear that the handing over of the key was never intended to give possession to the landlord. The tenant clearly intended to retain possession for herself until the Wednesday. The phrase "actual possession" requires actual control or apparent dominion in fact : *per* SCRUTTON, L.J., in *Hall* v. *Rogers* (4). C The phrase "apparent dominion in fact" exactly describes the possession of the key when one has that one fact and nothing else as evidence : *per* SCOTT, L.J., in *Holt* v. *Dawson* (1). Here there were other facts in evidence which contradicted any intention on the part of the landlord to obtain actual possession. D

Burton was not called upon.

SLESSER, L.J. : In this case, J. W. Goodier, the landlord of a certain dwellinghouse, sued Joseph Cooke, the tenant, claiming possession of the house let by him to the defendant on a weekly tenancy at a rent E of 12*s*. 6*d*. per week. The tenancy was duly terminated by a proper notice to quit. The plaintiff also claimed rent and mesne profits.

There is no question but that in 1939 this house was a controlled house, that the rent then was 9*s*. 8*d*. per week and that the tenant was a Mrs. Nelson. Mrs. Nelson wanted to move into a bigger house, and F a Mrs. Edwards wanted a smaller house. In consequence, Mrs. Nelson wrote to the landlord asking whether her tenancy might be given up, and on Feb. 28, 1939, received a letter from the landlord's agent, one Haigh. In that letter he uses the word "exchange," but the use of that word "exchange" was later explained to be an honest mistake. G The letter says :

> I am prepared to allow an exchange, provided that the references of the proposed tenant are satisfactory. The rent to the new tenant will be 12*s*. 0*d*. per week. Of course, I must have a week's notice from you before I can accept the new tenant. Please ask the proposed new tenant to supply me with references (her present landlord will do for one).

H

The proposed rent of 12*s*. would have been more than the landlord was allowed to ask if the house was to remain a controlled house. In accordance with that letter, on Mar. 2, 1939, Mrs. Nelson wrote to Haigh as follows :

> Please take one week's notice to leave above house, such notice expiring on Mar. 9.

Thus, on Mar. 9, the tenancy of Mrs. Nelson had come to an end by operation of the notice to quit.

By the Rent and Mortgage Interest Restrictions Act, 1923, s. 2 (3), the word "possession" is defined in connection with the words "where the landlord comes into possession of the whole of a dwellinghouse at A any time after the passing of this Act" for the purposes of that section as follows:

> For the purposes of this section, the expression "possession" shall be construed as meaning "actual possession", and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent.

B Therefore, if the proper view is that this was a mere change of tenancy from Mrs. Nelson to Mrs. Edwards made with the landlord's consent, that in itself would not give him that possession which by sect. 2 (1) would take the house out of the ambit of the Rent Restrictions Acts.

However, it is said here by the landlord, and is found to be a fact by C the judge, that what actually happened here was that the landlord did not merely suffer a change of tenancy from Mrs. Nelson to Mrs. Edwards, but himself entered into possession within the meaning of sect. 2 (1) on Mar. 9, before Mrs. Edwards became his tenant. The judge has come to that conclusion after having heard the evidence of the witnesses, D particularly the evidence of Haigh, the agent, and of Mrs. Louisa Nelson, whose evidence he said he accepted in preference to the evidence of Mrs. Edwards, which differs somewhat with regard to some of the transactions. The evidence of Haigh was this. As already pointed out, he had intimated in the letter of Feb. 28 that the rent of the new tenant E would be 12*s*. per week, which, of course, he would only be able to obtain on the basis that the house had ceased to be controlled. He said that on Mar. 9 he saw Mrs. Nelson, who handed him the key. He explained to Mrs. Edwards, to whom he subsequently handed the key, that the rent would be 12*s*. per week. He also said:

> F I remember taking the key in the house. I intended to decontrol by taking the key.

As an agent of this sort, dealing with this class of property, he must have had in mind that he could not decontrol unless on behalf of the landlord he retook possession within the meaning of sect. 2 (1) of the G 1923 Act. In taking the key, he had the intention of resuming possession on behalf of the landlord. Then he said:

> Although I got the key on Saturday, I knew the change-over was not going to occur on the Saturday.

It is explained later by Mrs. Nelson that, although she agrees that the H key was given by her to Haigh, and that subsequently he gave the key to Mrs. Edwards, the reason for that was that Mrs. Nelson was not going to move out of the house actually until the next Wednesday. Of course, during that period, although she had given up the key to Haigh, and Haigh had given the key to Mrs. Edwards, Mrs. Nelson would want the key in order that she might go in and out of the house.

There is some slight variation on that in Mrs. Edwards' evidence, because Mrs. Edwards says:

> **Haigh said:** "I gave you the key." I said "You did not. Mrs. Nelson did."

That is immaterial, however. As I say, I accept the view of the judge, who saw the witnesses, and who believed Haigh and Mrs. Nelson. The result of it is that, within the authorities, it is clear to my mind that A the judge was fully entitled to come to the conclusion (and I see no reason to differ from him) that the intention in the delivery of this key by Mrs. Nelson to Haigh was to give possession to the landlord, of whom Haigh was agent.

It has been pointed out by SCOTT, L.J., in *Holt* v. *Dawson* (1), at B p. 638, that the fact of handing over the key, where the intention is present to both landlord and tenant, may operate as giving up possession to the landlord, however short the time was. Whether the time be somewhat extended, as in *Jewish Maternity Home* (*Trustees*) v. *Garfinkle* (2), or whether it be two days, as in *Thomas* v. *Metropolitan* C *Housing Corpn., Ltd.* (3), or whether it be, as possibly in this case, a few minutes, matters not. It is a question of what was the intention of the parties in handing over the key. In those circumstances, the question of whether or not, in handing over the key, one gave possession is a question of fact. That has been constantly pointed out in these D cases, and I need cite only one example, *Hall* v. *Rogers* (4). The judge has found that the intention was here present in Haigh, on behalf of the landlord and Mrs. Nelson, that the landlord should come into possession whenever Mrs. Edwards was admitted as the new tenant. The old tenancy having expired, the mere fact that Mrs. Nelson, by E kind permission of Mrs. Edwards, remained on the premises until the next Wednesday does not seem to me to affect the question. As from Mar. 9, Mrs. Edwards became the tenant of these premises. Between the tenancy of Mrs. Nelson and Mrs. Edwards was interposed the possession of the landlord, and the landlord, therefore, was not in a F position of having come into possession "by reason only of a change of tenancy made with his consent." He was in actual possession within the meaning of sect. 2 of the 1923 Act. The result is that the house became decontrolled during that short period, and the new tenant was not a statutory tenant. Her successor in title, Joseph Cooke, also was G not a statutory tenant, and, therefore, cannot resist the action for possession, nor the claim for rent and mesne profits. This appeal fails and must be dismissed with costs.

CLAUSON, L.J.: I agree.

H

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *J. H. Milner & Son*, agents for *Leslie M. Lever & Co.*, Manchester (for the appellant); *Beardall, Fenton & Co.*, agents for *Fentons*, Manchester (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

SCHOOL OF ORIENTAL AND AFRICAN STUDIES *v.* WESTMINSTER CITY RATING AUTHORITY.

[KING'S BENCH DIVISION (Hawke, Charles and Tucker, JJ.), **April 24, 25, 1940.**]

Rating—Exemptions—School incorporated "to further research in . . . the languages of Eastern and African peoples"—Supported in part by annual voluntary contributions—Whether instituted for "purposes of science, literature or the fine arts exclusively"—Scientific Societies Act, 1843 (c. 36), *s.* 1.

A school was incorporated by royal charter in 1916, and its purposes were "to further research in, and to extend the study and knowledge of the languages of Eastern and African peoples, ancient and modern, and the literature, history, religion, law, customs and art of those peoples . . . including courses suitable to the needs of persons about to proceed to the East or to Africa for study and research, for the public services or commerce, or for the pursuit of a profession or other calling. . . ." The school, which was supported in part by annual voluntary contributions, was rated as occupier of a hereditament used for carrying into effect its purposes. Exemption from rates was claimed under the Scientific Societies Act, 1843, s. 1, on the ground that the school was instituted for the purposes of science, literature or the fine arts exclusively :—

HELD : upon the facts before them, the court of quarter sessions were right in law in holding that the school was not instituted for the purposes of science, literature or the fine arts exclusively.

[**EDITORIAL NOTE.** It has been held that the performance of mere ancillary matters will not prevent an institution from being held to be used exclusively for a certain purpose, but, in the present case, the facts show that the institution here in question was used to promote commercial purposes to an extent which was far beyond what could be described as ancillary.

AS TO THIS EXEMPTION, see HALSBURY, Hailsham Edn., Vol. 27, p. 377, para. 807 ; and FOR CASES, see DIGEST, Vol. 38, pp. 493-499, Nos. 485-540.]

Cases referred to :

(1) *R.* v. *Institution of Civil Engineers* (1879), 5 Q.B.D. 48 ; 38 Digest 497, *508* ; 49 L.J.M.C. 34 ; 42 L.T. 145.

(2) *Inland Revenue Comrs.* v. *Forrest* (1890), 15 App. Cas. 334 ; 38 Digest 496, *503* ; 60 L.J.Q.B. 281 ; 63 L.T. 36 ; 3 Tax. Cas. 117 ; *affg.* S.C. *sub. nom. Re Duty on Estate of Civil Engineers Institution* (1888), 20 Q.B.D. 621.

(3) *Westminster City Council* v. *Royal United Service Institution*, [1938] 2 All E.R. 545 ; Digest Supp.

(4) *R.* v. *Cockburn* (1852), 16 Q.B. 480 ; 38 Digest 495, *495* ; 18 L.T.O.S. 302 ; *sub nom. R.* v. *St. Martin-in-the-Fields (Churchwardens & Overseers)*, 21 L.J.M.C. 53.

APPEAL by the ratepayers by way of special case stated by Quarter Sessions for the county of London. The facts and the arguments are fully set out in the judgments.

A. S. Comyns Carr, K.C., and *Michael E. Rowe* for the appellants.

J. D. Casswell, K.C., and *G. D. Squibb* for the respondents.

HAWKE, J. : In the view I take of this case, it does not seem to me to be necessary to discuss at any length the various decisions which have been cited to us. If we were concerned at the present moment with law for law's sake, and not with the question as to how we should decide this particular case, I confess I should like to follow up the mystery as to whether or not *R.* v. *Institution of Civil Engineers* (1) was ever overruled by anybody, and more particularly by *Inland Revenue Comrs.* v. *Forrest* (2) in the House of Lords, to which I need make no further A reference at the moment. In my view, however, this case can be decided without discussing those matters.

There is no dispute about the figures and the sole question is whether the exception in the Scientific Societies Act, 1843, s. 1, applies. This section provides as follows: B

> No person or persons shall be assessed or rated or liable to be assessed or rated . . . in respect of any land houses or buildings . . . belonging to any society instituted for the purposes of science, literature, or the fine arts exclusively. . .

Then the section goes on to make various exceptions which it is unnecessary to read. It follows (and this follows the argument of counsel C for the respondents, with which I personally entirely agree) that, to be exempted from liability to be rated, it is for this society to bring itself within the exception. In the opinion of this court, it has not succeeded in obtaining any finding of fact bringing it within the exception. The society is obviously an excellent one, and it is probably the fact that D they are performing services to the British Empire of an exceedingly important nature. However, that is a consideration which would not justify us in deciding in their favour, unless the law permitted it.

The appellants are liable to be rated, unless they are exclusively engaged in the improvement or study of the literature, fine arts or E science of the matters with which they are connected. The court are unable to find that they are so exclusively engaged. Apart from their contribution to the improvement of literature, science, or the fine arts, they are engaged in teaching people who are interested for purely commercial reasons in the study of the languages appropriate to the Orient F or to Africa. This appears to the court to be a matter which is in no way concerned with the scientific side of such languages or their literature, nor to be incidental thereto. For these reasons, the court is of opinion that the answer to this case should be that, upon the facts stated, quarter sessions were right in law in holding as they did. G

Charles, J.: I entirely agree with what Hawke, J., has said in his judgment, but, inasmuch as this case may go further, I think that it would be proper that I should give my own reasons for agreeing with that conclusion. H

It is not inconvenient, I think, in a case of this sort, to examine, from the materials which were before the rating tribunal, how this School of Oriental and African Studies came into being, because we have to determine whether there was evidence before quarter sessions which entitled them to come to the conclusion that this school was not a school or society "instituted for the purposes of science, literature or the fine arts exclusively." For the moment, therefore, let us see how this school came into being. In 1907, a committee with Lord Reay as chairman was appointed by Sir Henry Campbell-Bannerman "to consider the organisation of Oriental studies in London." The committee considered the matter, examined a large number of witnesses, and produced its report on Dec. 23, 1908. The committee summarised its arguments and conclusions as follows:

> There is urgent need for the provision of suitable teaching in London for persons about to take up administrative or commercial posts in the East and in Africa. A knowledge of the language, and some preliminary knowledge of the history and religions and social customs of the country to which they are appointed, is essential to such persons. To meet the need referred to in the foregoing paragraph a School of Oriental Studies should be built up on the nucleus of Oriental teaching now existing at University and King's Colleges and should be incorporated in the University of London. It should possess a name and home of its own.

Consequent upon the report of that committee, there was established in London this School of Oriental Studies which, by a later charter, had its title extended to the School of Oriental and African Studies. In art. 2 of the unamended charter of incorporation, which was duly granted, we find the purposes of the school set out. Many cases, mainly on revenue matters and in connection with the Customs and Inland Revenue Act, 1885, have been quoted to us, but in no case does one find the same terminology as one finds in art. 2, which deals with the purposes of this school. They are certainly clearly set out there as follows:

> Purposes of the School. The purposes of the school are to further research in, and to extend, the study and knowledge of the languages of Eastern and African peoples, ancient and modern, and the literature, history, religion, law, customs and art of those peoples by any means that the governing body of the school may consider conducive or incidental thereto, and in particular by the provision of a School of Oriental and African Studies, affiliated to the University of London, in which such research and study may be prosecuted and such knowledge disseminated by publications and lectures and courses of study, including courses suitable to the needs of persons about to proceed to the East or to Africa for study and research, for the public service or commerce, or for the pursuit of a profession or other calling, having regard to the provision for those purposes which already exists elsewhere, and in particular to the co-ordination of the work of the school with that of similar institutions in this country, and in our Eastern and African Dominions and with the work of the University of London and with its other schools.

The purposes are set out with great plainness and particularity, and in absolute accord with the resolution arrived at by the committee which was the genesis of the establishment of the school. The study was not only for research, not only for the extension of the knowledge of the science, the literature and the fine arts of the East, but also for something very much more practical. It was to instruct people so that they could efficiently fulfil public service, or engage in commerce, or pursue a profession or other calling, in which they could not fulfil their duties satisfactorily without a knowledge of the various languages and various countries to which they went. So much was it the impression (and I think the right impression) that that was the meaning of the establishment of the school that in 1914 a city appeal committee was constituted by Sir Montagu Turner, who was a former member of Lord Reay's committee, to which I have just referred. One can see how the matter is all linking together in one direction. This resolution was moved:

> That in view of the great Imperial and commercial interests dependent on adequate provision being made for instruction in the languages, the literature, and the social customs of Oriental and African countries, this meeting desires heartily A
> to support the scheme for the foundation of a School of Oriental Studies in the city of London.

Lord Inchcape at this meeting proposed the following resolution:

> That this meeting desires to commend to the commercial community of the city of London and to the general public an appeal for the funds necessary to enable the School of Oriental Studies to be opened in 1915 on a satisfactory financial B
> basis.

The object of the committee was to raise an endowment fund of £150,000.

It is quite plain that the real object of this school was to further professional and commercial interests in the Orient and in Africa. It was pointed out that in this respect Britain lagged far behind other C
continental countries, notably Berlin and St. Petersburg. This charter was obtained, therefore, and the purposes were rightly expressed to be directed to studies which would assist those who were going to foreign countries for commercial purposes or for taking up Indian Civil Service appointments, colonial appointments, or other professional appointments D
in these various countries.

It is quite plain that there are a considerable number of people in this school who are studying Oriental languages because they like to study them. The question is, however, whether it can be said by any stretch of imagination that the society "was instituted for the purposes of E
science, literature or the fine arts exclusively." It is quite plain, when one looks again at this book, that it would be doing violence to the ordinary connotation of the word "exclusively" to say that one could apply any such word to this society. Since the school was started, over 3,000 students have passed through it. There has been an average F
attendance of 550 in the past five sessions. The school started with 9 students, and the need for it was so urgent and so real that in 10 years over 3,000 students passed through it. They were taught matters which were suitable to the work which they were undertaking, whether as Colonial officers, as Indian Civil Servants, or as people going out to G
undertake commercial duties. All sorts of languages were taught. The political history and philosophy of the different countries, and numerous other subjects, were taught by people expert in the teaching of such matters. There were 41 members of this society, and they occasionally gave lectures, but they all devoted themselves to research. There were H
55 additional lecturers, who devoted themselves, not to research at all, but to lecturing. There were many hundreds of students. When one sees what they were learning, one finds that, except for a few who were going to enter for what is called the higher degrees, in 1937 and 1938 there was not a single one doing research work. They were all doing

what I think this school was really established to do—namely, teaching people to equip themselves to do credit to this country, whether in a profession or in commerce or in administrative work in the East, in Africa, or in the Colonies, and equipping themselves by education which was well within the purposes, and the express purposes, of the charter.

A It has been argued that the word " exclusively " means something other than exclusively. There is no case which says that. In *Inland Revenue Comrs.* v. *Forrest* (2), it is specifically pointed out in the opinion of LORD WATSON in the House of Lords, at p. 348, that, although the word " exclusively " would mean "chiefly" or "mainly" in the Customs B and Inland Revenue Act, 1885, yet, if a person wishes to get exemption from paying the ordinary rates under the Act of 1843, with which we are now dealing :

> Then it is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature, or the fine C arts. One or other of these must be its exclusive object ; so that an institution which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption. The provisions of subsect. (3) present in several important particulars a striking contrast to these enactments. They dispense with the necessity for any of the enumerated purposes being exclusive, it being sufficient that the property of the institution is in the main devoted to one or other of them . . .

D That being the state of affairs, as I conceive it to be in law, one looks at the case to see whether quarter sessions, upon the facts before them, were right in law in holding that the appellants were not " instituted for the purposes of science, literature, or the fine arts, or one or more of such purposes exclusively." According to the case stated, the calendar E of the school contains :

> . . . full particulars of the instructional facilities given at the school, which contains 45 classrooms and separate common rooms for the staff, and for men students and for women students. In addition to instruction in languages, phonetics, culture and history, and linguistics, as set out on pp. 48, 49 of the said calendar, elementary classes are held in French and German by private arrangement for research students F requiring to read these languages for the purposes of research.

Then further on in the case stated it says that there are students holding positions of various kinds in the East who attend simply from their desire for knowledge. Reference is made to the languages which are taught, and to the fact that students are prepared for examinations in history, law G and economics (commerce). The case refers to an analysis of the students attending the school in recent years and refers to the fact that courses are provided " which may profitably be attended by candidates for matriculation," who can take the intermediate and final examinations for the degree of Bachelor of Arts in various Oriental and African H languages and subjects. Certificates are granted by the school. It is only students attending for higher degrees, as they are called, who are required to undertake research, because without doing so they cannot get a higher degree. Further reference is made to the fact that a number of probationers for the Colonial Civil Service also attend the school, and similar considerations apply to them. They have special courses of study provided for them. Why are all these things done? They are done in order to fulfil the express purposes set out in art. 2 of the charter of incorporation.

In the face of all these matters, I say again, not only that quarter sessions arrived at a correct conclusion, but also that it would be doing violence to ordinary language, and, as LORD WATSON said, to the plain language A of the statute, to say that a school of this sort should be regarded as a society "instituted for the purposes of science, literature, or the fine arts exclusively." I quite agree that, if the facts were the other way, and if it were all research, and only incidentally did some people make use for monetary purposes of the education they received in their pursuit B of knowledge, the school would come within the exception, and would be entitled to exemption from rates. However, the whole history of this school, and the work it does, according to the evidence given first before the rating authority and then before quarter sessions, leads one to the inevitable conclusion that this is not one of the societies C which comes within the exemption. I agree, therefore, that the appeal must be dismissed.

TUCKER, J.: I agree. I think that this question is really a question of fact to be decided by the court of quarter sessions, but, of course, in D deciding the question of fact, they must apply the facts as found by them in accordance with the law. If they have in any way misdirected themselves, then the question of law arises. Speaking for myself, I could have wished that this special case had set out precisely what were the points of law argued before the court of quarter sessions, and what E was the opinion of the court thereon. The case is not stated in that way, and, therefore, it is for us to say whether, on the facts stated in this case, the court of quarter sessions must have come to a wrong conclusion in law. I think that there was ample material on the facts stated, and in the documents and books which are made part of the special case F by reference, including the calendar which has been referred to by CHARLES, J., to justify the conclusion at which the court of quarter sessions has arrived. I think that the court was entitled to look, not only at the precise wording to be found in the charter, but also at all the surrounding circumstances and the history connected with the G institution of this school. It is clear, when one considers the matters which have been referred to by CHARLES, J., that one of the purposes for which this school was instituted was to train and turn out candidates trained in the particular subjects with which this school was dealing for the Indian Civil Service and for commercial undertakings. H

It is said that the reference in art. 2 to the establishment of this school for the purpose of teaching these students, is merely a means of carrying out one of the previously expressed purposes of the school. As a matter of language, that is true, but, none the less, when one looks at the whole of the facts of the case, and at all the surrounding circumstances, although this article has been framed in this way, it is quite clear that one of the substantial objects of the school was to train in these subjects all persons for the Indian Civil Service and for commerce. I do not think that this is a case where the training of such students is a matter which is merely incidental to the original purpose for which A this school was established.

There is only one further observation which I wish to make. In para. (*c*) of the special case, it is stated as follows:

> All the staff are primarily engaged in carrying on research and the teaching activities of the school occupy a very small proportion of their time. All members B have to give an undertaking before their appointment that they will carry on research, and the time of the members of the professional staff is mainly taken up with research; in some cases research occupies nine-tenths of the time even of a full-time member.

I think that at first sight those words are apt to be a little misleading. They do not amount to a finding that the primary activities of this C school are researches. It is a statement with regard to the time and activities of certain people who are called members. They form only a part of the total teaching staff of this establishment, there being no less than 55 additional lecturers, whose work is devoted to the training of these students.

D Having come to the conclusion that one of the purposes for which this school was instituted was the training of students for the Indian Civil Service and commercial purposes, I think that that concludes the case, because in *Westminster City Council* v. *Royal United Service Institution* (3) BRANSON, J., quoting with approval what had been E said by LORD CAMPBELL in *R.* v. *Cockburn* (4), used these words, at p. 550:

> He also held—and with great respect I think that he correctly held—that the teaching of people to exercise the professional art of a soldier was not a purpose of science, within the meaning of the language used in the Scientific Societies Act.

F That being, as I think, a correct statement of the law with regard to this matter, it follows that in this case, one of the objects being the training of these students for these purposes, that does not amount to the society having been instituted for the purpose of science. I agree that this appeal fails.

G *Appeal dismissed with costs.*

Solicitors: *Field, Roscoe & Co.* (for the appellants); *Allen & Son* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

IN THE ESTATE OF DAY.

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P.), **April 9, 1940.]**

Executors and Administrators—Probate—Will and two codicils—Second codicil disputed—Grant of probate limited to will and first codicil.

The deceased left a will and two codicils. Only the second codicil was disputed, and the executors of the will asked the court to pronounce for the will and first codicil, leaving the question of the second codicil to be decided by action. The respondent to the motion had issued a writ propounding the will and both codicils, but did not oppose the motion or ask for the appointment of an administrator *pendente lite*, provided that the property dealt with by the second codicil was protected :—

Held : the executors might prove the will and first codicil, preserving always the property disposed of by the second codicil and the respondent's rights thereunder.

[**EDITORIAL NOTE.** A grant of administration *pendente lite* in the circumstances of this case would have caused unnecessary expense, and the court has allowed a limited grant of probate.

As to Limited Grants of Probate, see HALSBURY, Hailsham Edn., Vol. 14, pp. 213, 214, paras. 355-359; and for Cases, see DIGEST, Vol. 23, p. 124, Nos. 1214-1220.]

Case referred to :

(1) *Graham* v. *Nicholson*, Unreported.

Motion for grant of probate of the will and first codicil of Harry Day. The testator left a will and two codicils. The second codicil was disputed, and the applicants, the executors of the will of the testator, asked the court to pronounce for the first will and codicil, leaving the question of the second codicil to be decided by action. The applicants contended that such an order was made in *Graham* v. *Nicholson* (1), an unreported case. The will and first codicil disposed of most of the estate, while by the second codicil certain freehold property was left to the respondent to the motion, Mrs. Sybil Duse. The respondent had issued a writ propounding the will and both codicils, but did not object to the order, provided that the property dealt with by the second codicil was safeguarded pending the action. It was pointed out in the course of argument that the proposed course would be less expensive than the usual course of appointing an administrator *pendente lite*.

A. Melford Stevenson for the applicants.

G. C. Tyndale for the respondent.

Sir Boyd Merriman, P. : The executors may prove the will and first codicil, but the respondent's rights under the second codicil must be preserved. If necessary, the words of the order may be taken from the order in *Graham* v. *Nicholson* (1). The executors must undertake not to dispose of the property dealt with in the second codicil, except so far as may be necessary for the purpose of preserving it. The respondent's costs will be paid out of the estate.

Solicitors: *Wrinch & Fisher* (for the applicants); *S. F. Miller, Mathews & Co.* (for the respondent).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

A

LOWRY *v.* CONSOLIDATED AFRICAN SELECTION TRUST, LTD.

[HOUSE OF LORDS (Viscount Caldecote, L.C., Viscount Maugham, Lord
B Russell of Killowen, Lord Wright and Lord Romer), **February 20, 21, 22, 26, 27, May 8, 1940.]**

Income Tax—Deduction against profits—Remuneration of employees—Issue of shares of nominal value—Income Tax Act, 1918 (c. 40), *Sched. D, Cases I, II, r.* 3.

C A company issued 6,000 ordinary shares to its employees at par, the par value being 5*s*. The market value at the time was £2 3*s*. 9*d*. The employees were assessed to tax in respect of the difference between the market value and the par value. The salaries of the employees had been fully paid quite apart from this issue of shares. It was contended that the difference between the par value and the market value of all the shares so issued was deductible against the profits
D of the company as a revenue expense:—

HELD (LORD WRIGHT and LORD ROMER *dissenting*): the difference between the par value and the market value of the shares was not deductible in computing the profits of the company's trade assessable to income tax, because the issue of the shares did not involve the company in any expense for the purpose of its trade.

Order of Court of Appeal ([1939] 1 All E.R. 353) *reversed.*

E

[EDITORIAL NOTE. The contention on behalf of the company in this case was that the amount of the difference between the par value and the market value was an amount forgone by the company. In deciding in favour of this contention, the Court of Appeal held that the right or privilege to obtain a premium on the shares was a right or privilege which in the company's hands had a money value.
F The House of Lords have held, however, that the mere election by the company not to obtain more than the nominal value of the shares in order to induce their servants to become shareholders cannot be treated as a disbursement or expense on the part of the company, nor could the premium which the servants might have obtained by a sale of their shares be treated as money laid out or expended by the company for the purposes of their trade. LORD WRIGHT in a dissenting
G judgment regards the issue of the shares as a bonus payment to the employees and, therefore, part of their remuneration. LORD ROMER, who also dissents, after making valuable observations on the proper form of accounts in such a case as this, considers the question whether the decision in *Usher's* case (2) extends to payments other than the property tax on houses.

AS TO DEDUCTIONS AGAINST PROFITS, see HALSBURY, Hailsham Edn., Vol. 17,
H pp. 150-156, paras. 311-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.]

Cases referred to:

(1) *Salmon* v. *Weight* (1935), 153 L.T. 55; Digest Supp.; 19 Tax Cas. 174.

(2) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 28 Digest 56, *287*; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *revsg.*, [1914] 2 K.B. 891.

(3) *Hoare & Co., Ltd.* v. *Collyer*, [1932] A.C. 407; Digest Supp.; 101 L.J.K.B. 274; 146 L.T. 469; 17 Tax Cas. 169.

(4) *Russell* v. *Town & County Bank* (1888), 13 App. Cas. 418; 28 Digest 45, *227*; 58 L.J.P.C. 8; 59 L.T. 481; 2 Tax Cas. 321.

(5) *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309; 28 Digest 59, *302*; 62 L.J.Q.B. 41; 67 L.T. 479; 3 Tax Cas. 185.

(6) *Hilder* v. *Dexter*, [1902] A.C. 474; 9 Digest 230, *1467*; 71 L.J.Ch. 781; 87 L.T. 311; *revsg.* S.C. *sub nom. Dexter* v. *United Gold Coast Mining Properties, Ltd.*, 17 T.L.R. 708.

(7) *Inland Revenue Comrs.* v. *Blott, Inland Revenue Comrs.* v. *Greenwood*, [1921] 2 A.C. 171; 28 Digest 107, *663*; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101.

(8) *Tennant* v. *Smith*, [1892] A.C. 150; 28 Digest 17, *87*; 61 L.J.P.C. 11; 66 L.T. 327; 3 Tax Cas. 158.

APPEAL by the Crown from an order of the Court of Appeal dated Feb. 1, 1939, and reported [1939] 1 All E.R. 353, reversing an order of MACNAGHTEN, J., dated Nov. 10, 1938, and reported [1938] 4 All E.R. 689. The facts and the arguments are fully set out in the opinions of their Lordships.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the appellant.

J. Millard Tucker, K.C., and *Terence Donovan* for the respondent company.

VISCOUNT CALDECOTE, L.C.: My Lords, this appeal from a judgment of the Court of Appeal, delivered by SIR WILFRID GREENE, M.R., allowing an appeal from MACNAGHTEN, J., raises a difficult question concerning the computation of the profits of a trade carried on by a limited company. The respondent company, which carried on the business of searching for and winning diamonds, was incorporated on Oct. 11, 1924, under the Companies Acts, 1908 to 1917, with a nominal capital of 1,000,000 shares of 5*s.* each. By a special resolution passed at an extraordinary general meeting of the company on Dec. 6, 1933, the capital of the company was increased by the creation of a number of preference shares and of 400,000 new ordinary shares of 5*s.* each, out of which 10,000 shares were to be reserved for issue to employees of the company at such time or times, and upon such terms and conditions, as the directors should determine. Six months later, the directors passed a resolution authorising the chairman and vice-chairman of the company to allot and issue on such terms and conditions as they should determine up to a total of 6,000 ordinary shares to employees under the special resolution of Dec. 6, 1933. Accordingly, a letter was written on June 15, 1934, to certain members of the staff of the company in the following terms:

> The directors desire to show their appreciation of special services you have rendered to the company by giving you an opportunity to acquire a share interest in the company on favourable terms. If you will kindly fill up and return to the secretary the enclosed form of application for — shares together with a remittance for £— being payment in full at par—namely, 5*s.* per share—you will in due course receive an allotment.

In response to this invitation, applications were made for the whole of the 6,000 shares so offered, and payment was made in full. On July 2, 1934, allotments were made and certificates issued to the applicants. On that day, the market price of the ordinary shares was £2$\frac{3}{16}$ to £2$\frac{1}{4}$, making a middle market price of £2 3*s.* 9*d.* It was calculated, therefore, that, if the new shares had been issued in the open market, a premium at the rate of £1 18*s.* 9*d.* would have been received, amounting to a total of £11,625, this amount representing the difference between the middle price of the shares in the open market and the sum paid on allotment. The respondents claim to deduct this sum in computing their profits for income tax purposes.

One other fact appearing from the special case must be stated. The employees of the company resident in England who received these shares were assessed to income tax under Sched. E on the premium value of the shares on the footing that they were paid this amount as remuneration for their services. The assessment was justified, as SIR WILFRID GREENE, M.R., pointed out in his judgment, by the law as declared in *Salmon* v. *Weight* (1). It was there decided in your Lordships' House that the profit which the taxpayer in that case was in a position to make by going on the market and selling shares allotted to him on payment of less than the market price was an immediate profit in the nature of money's worth received by him. The employees of the respondent company have in the same way been treated as receiving money's worth to the extent of the premium value of the shares, and have been assessed accordingly. Whether the directors intended that this should be the result of their offer of shares to its employees on the terms contained in the letter of June 15, 1934, may be open to some doubt. It is at least as likely, if attention is paid to the terms of the letter, that the directors really intended to give their employees a chance of acquiring a share interest in the company at a favourable price, so that they might have what is sometimes called a stake in the company with the success of which their own interests were so closely connected. If the wish of the company had been that their employees should be remunerated by receiving shares which could be turned into cash, the simple course of making a direct payment of an equivalent amount of cash would have produced precisely the same result. The payments could no doubt have been made out of the ordinary resources of this prosperous company. If some special provision of funds to meet the payments were required, shares to the necessary amount could have been issued on the open market at the full price obtainable. This course would have allowed the company without question to treat the payments as trading expenses, and to deduct them from its gross receipts in making up its trading account. The company chose to take another course, which did not involve any expenditure of its money, or realisation of any of its assets. It was perfectly entitled to take that course, even though the result might have been to divert into the pockets of its employees the equivalent of the cash profit which it might otherwise have obtained. In fact, the company did not obtain the cash profit. It is none the less said on its behalf that it is entitled to make up its trading account as if it had expended a sum of money equivalent to the premium value of the shares in the remuneration of its employees.

I find no guidance from the fact that the employees have had to pay A income tax on the premium value of their shares. The assessment on the employees was on the ground that, holding an office or employment of profit, they received a profit therefrom. The right to include a deduction of the amount in question in the trading account of the company for the purposes of Sched. D must be justified by a finding B that the company incurred a trading expense. The question which has to be decided, therefore, is whether, by reason of the fact that the company did not make use of the opportunity of issuing shares at a premium, it can be said to have incurred a trading expense to the amount of the premium. C

My Lords, it is to be observed that at the outset of his argument counsel for the respondents was insistent in disclaiming any intention to base his case upon the contention that the profit on the shares was forgone, and could, therefore, be deducted as an expense. The foundation for such an argument is to be found, if at all, in some observations by D LORD SUMNER in his opinion in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (2), at p. 469. Those observations, which were cited at length by SIR WILFRID GREENE, M.R., were as follows, at p. 469:

> A trader who utilises, for the purposes of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me E to put himself to an expense for the purposes of his trade. Equally he does so if he hires or rents for that purpose property belonging to another. The amount of his expense is *prima facie* what he could have got for it by letting it in the one case, and what he pays for it when hiring it in the other. Where he gets something back for it, while employing it in his trade, by receiving rent or hire for it in connection with that trade, the true amount of his expense can only be arrived at by giving credit for such receipt. In principle, therefore, I think that in the present F case rent forgone, either by letting houses, which the brewers own, to tied tenants at a low rent instead of to free tenants at a full rack rent in the open market, or by letting houses in the same way, which they hire and then relet at a loss, is money expended within Sched. D, Cases I and II, r. 1.

In view of the disclaimer by the respondents' counsel of any intention of basing his case on the argument that a "profit was forgone" in the G present case, it is unnecessary to say more about the propositions contained in the passage I have quoted from the opinion of LORD SUMNER than that they may require very careful examination if they are relied on as having the authority of your Lordships' House. SIR WILFRID GREENE, M.R., however, did not refer to these observations H for the purpose of supporting the argument which counsel for the company was at pains to disclaim. On the contrary, he expressly rejected the argument. I agree with him, so far as I understand the argument, but in any case the word "forgone" as used by LORD SUMNER was no more than an apt word to describe the result of a simple arithmetical calculation—namely, the deduction of amounts of the rent received by the brewery company from amounts of the annual value or of the rent paid by the brewery company in respect of premises used by it in selling its liquor. It is clear that any attempt to build upon the use of the expression "rent forgone" any such argument as was, A apparently without justification, fathered by the Crown on the respondents' counsel must fail.

It is said, however, that the decision in *Usher's* case (2), supported and explained as it is by *Hoare & Co., Ltd.* v. *Collyer* (3), was based upon a broad principle which is applicable to the present case. The B argument is that the company parted with money's worth in issuing the shares at par to the employees, or, to use the words of SIR WILFRID GREENE, M.R. ([1939] 1 All E.R., at p. 362), the company:

> . . . has remunerated its employees to its own financial prejudice, by giving to its employees the power which it had itself of obtaining a monetary sum in respect C of these shares.

This view of the facts is said to warrant the conclusion, on the authority of *Usher's* case (2), that the respondents are entitled to make the deduction in question. It is therefore necessary to examine *Usher's* case (2) to see whether it really is an authority for this proposition.

D The facts of *Usher's* case (2) are familiar. The brewery company owned or rented houses in order to provide places in which the company's liquor could be sold. So far as the freehold houses were concerned, the annual value for the purposes of Sched. A was treated as an expense incurred by the company. In the case of the leaseholds, E the rent paid, which, as EARL LOREBURN pointed out, was not other than the proper annual value, was an obvious item of expense. Both freeholds and leaseholds were let as tied houses at rents less than the annual value, and the difference was claimed by the brewery company to be a permissible deduction. What is now Sched. D, Cases I and II, F r. 3, with its prohibition of certain deductions, had on those facts to be considered. LORD PARKER called attention to the three points decided on the construction of the rule in *Russell* v. *Town & County Bank* (4), at p. 460—namely, (i) that the annual value or rent of premises used wholly for the purposes of the trade is a proper deduction G in ascertaining the balance of profits and gains, (ii) that the effect of the prohibition now contained in r. 3 (*c*) could not be extended by implication to cover a deduction which would otherwise be a proper deduction, and (iii) that what is now r. 3 (*a*) does not preclude a deduction for the annual value of premises used wholly for the purposes of the trade, H though the annual value is not money expended in the ordinary sense of the word. Applying that construction, your Lordships' House decided that the deduction claimed was properly made in ascertaining the balance of profits and gains.

The brewery company was treated, in the case both of its freehold and of its leasehold premises, as incurring an outlay. The deduction of the outlay, once it had been decided to have been incurred, was no more than an application of the elementary principle stated by LORD HERSCHELL in *Gresham Life Assurance Society* v. *Styles* (5), at p. 321 :

> . . . profits are ascertained by setting against the income earned the cost of earning it . . .

With the greatest respect to the Court of Appeal, I am unable to find any principle laid down in *Usher's* case (2) which can be applied to the facts of the present case, even assuming that the view of those facts taken by SIR WILFRID GREENE, M.R., was the one which commended itself to me.

I come back to the facts of this case, and I ask whether the issue of these shares in the manner adopted involved the respondent in any "disbursements or expenses . . . wholly and exclusively laid out or expended for the purposes of" its trade. Its capital was intact after the issue of the shares. Not a penny was in fact disbursed or expended. Its trading receipts were not diminished, nor do I think it is a right view of the facts to say that the respondent gave away money's worth to its own pecuniary detriment. The company was entitled to issue its shares at par. It did so, and the company never received, and never elected to receive, anything more than the par value of the shares. Quite apart from any desire to let the employees have a share interest in the company, the directors might have had very good reasons for deciding not to issue shares to the company's employees at a price which could only be justified by an expectation of very high dividends over a long period of time.

I am fortified in this view by the opinion of LORD DAVEY in *Hilder* v. *Dexter* (6), at p. 480. In that case, the appellants had subscribed to shares in a company with an option to take further shares at par. The shares rose to a premium, and the appellants desired to take them up. The opinion of LORD DAVEY contains the following passage, at p. 480 :

> . . . the argument seems to be that the company, by engaging to allot shares at par to the shareholder at a future date, is applying or using its shares in such a manner as to give him a possible benefit at the expense of the company in this sense, that it forgoes the chance of issuing them at a premium. With regard to the latter point, it may or may not be at the expense of the company. I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide.

I should very much regret it if the law was not what, in the light of the opinion of LORD DAVEY, I conceive it to be. If, in the circumstances of this case, the company must be held to have suffered a financial detriment, or, in other words, to have incurred an expense, solely by reason of the fact that it did not issue its shares at a premium, very far-reaching results might follow in many cases in which, for one reason or another, an opportunity of securing some financial advantage is not used. That, however, does not in any way affect or alter the view I

take of this case on the facts. The plain fact, as it appears to me, is that the cost to the company of earning its trading receipts was not increased by the issue of these shares at less than their full market value. In my view, this appeal should be allowed, and I move accordingly. As to costs, I observe that leave to appeal was given on condition
A that the order of the Court of Appeal directing that the Crown should pay the costs of the hearing in the King's Bench Division and in the Court of Appeal should not be disturbed, and that the Crown should pay the respondents' costs in your Lordships' House in any event. Although I should be reluctant to interfere with the discretion of the
B Court of Appeal as to the conditions on which leave to appeal should be given, I venture to think that no injustice would have been done in this present case if the matter of costs had been dealt with in the ordinary way.

C VISCOUNT MAUGHAM: My Lords, this is an appeal from an order of the Court of Appeal allowing an appeal by the respondent from an order made by MACNAGHTEN, J. The matter arises upon a case stated by the commissioners for the general purposes of income tax for the city of London. The Court of Appeal, allowing the appeal to them,
D reversed the decision of MACNAGHTEN, J., and restored the decision of the commissioners.

It is unnecessary to repeat the special case, and, in the view I take of the appeal, it is unnecessary to travel into some of the matters discussed in the Court of Appeal and before your Lordships. The material
E facts are as follow. The company (as I shall call the respondents) was incorporated in 1924, and its main business has been that of searching for and winning diamonds and selling them. Its original capital was £250,000, divided into 1,000,000 shares of 5*s*. each. It has been very successful. On Dec. 6, 1933, by a special resolution, the capital of the
F company was increased to £600,000 by the creation of 250,000 redeemable preference shares of £1 each and 400,000 new ordinary shares of 5*s*. each, and it was resolved that 10,000 of such new ordinary shares be reserved for issue to employees of the company at such time or times, and upon such terms and conditions, as the directors should determine.
G By letter dated June 15, 1934, and sent to certain members of the staff, the chairman of the company stated that the directors desired to show their appreciation of special services which certain members of the staff had rendered to the company:

> . . . by giving [those members] an opportunity to acquire a share interest in
> H the company on favourable terms.

The shares were standing in the market at a premium, but were offered by the letter at par. In all, 6,000 shares in the company, pursuant to the offer in the letter, were applied for at par—namely, at 5*s*. per share—by these employees, and in due course they were allotted to them. The 6,000 shares, of course, formed a part of the 10,000 shares reserved for issue to employees, as I have stated, and it is not wholly immaterial to note that the directors were not entitled to do anything except to issue them to employees.

The shares of the company at that time were quoted in the market at £2 3*s.* 9*d.* per 5*s.* share, and the premiums on 6,000 shares would have amounted to £11,625. If, then, the 6,000 shares had been allotted A to the public at the price of £2 3*s.* 9*d.* per share, the company on that footing would have received the sum of £13,125, and it is said that, if it had then distributed the premiums—namely, £11,625—as a bonus to the employees to whom the shares were in fact allotted, it would in that case have been entitled to be allowed that sum as a proper expense B or deduction in computing its profits and gains under Sched. D for the year in question. Neither of those things happened, and what we have in effect to consider is whether, since the company has not in fact received any part of the sum of £11,625, the premiums which the company might have got and expended, but never did get or expend, can be treated as an C expense or deduction laid out or expended in some artificial but legitimate sense for the purpose of the trade of the company. This is a rather difficult proposition to establish in the affirmative. We are invited to consider something which did not take place, and it is to be remembered that in *Inland Revenue Comrs.* v. *Blott* (7) this House declined to be D influenced by the argument that the case before it was the same as if the shareholders had received the bonus and paid it back to the company to be retained as capital. The simple answer was that they never received it at all (at pp. 184, 194, 200). The same answer might, I think, be given here. The hypothetical view of the facts is not here the true E one. The plain object of the company, as the resolution and the letter of June 15, 1934, show, was to give to the employees in question "an opportunity to acquire a share interest in the company on favourable terms." The directors were making use of their powers to enable this to be done. The terms were favourable in order to make sure that the F offer would be accepted. The advantage to a trading company or a business firm of an arrangement as the result of which employees get a stake in the concern is one which has been dilated upon for the past hundred years. It is a false view of the transaction to regard it merely as a present of money or money's worth. The company, it is true, parts G with a right, since shares, once issued, cannot (except in cases of forfeiture) be issued again, but the nature of this right must now be considered.

In my opinion, this appeal largely turns on the nature of the right of a company to issue its shares at any price and on any conditions it thinks H fit, provided that it does so in good faith for the benefit of the company, and does not issue them at a discount: *Hilder* v. *Dexter* (6), at p. 475. Upon an issue of shares, the assets of the company are increased by the amounts obtained from the subscribers. These amounts are obviously not profits or gains of the trade, and they are not liable to be brought into the accounts for income tax. It may be said that these amounts are of the nature of capital, but I prefer for the present purpose to say that beyond all doubt they are not profits and gains arising or accruing from a trade, for that goes directly to the question which arises under Sched. D. What I have said is equally true whether the shares are allotted at par or at a premium. The sum of £11,625, which in this case the company might hypothetically have received for premiums, was not an item in its profits and gains. In the ordinary course, such a sum would be carried to a reserve account in the balance sheet, but carrying it to some account in the profit and loss account would not have affected the matter. It would not be an item of profit of the trade. Indeed, the issue of shares by a limited company is not a trading transaction at all. The corporate entity becomes *pro tanto* larger, but the receipts of the trade, on the one hand, and the amount of the costs and expenditure necessary for earning these receipts, on the other, remain unaltered, and it is the difference between these two sums which is taxable under Sched. D. It is well-settled that profits and gains must be ascertained on ordinary commercial principles, and this fact must not be forgotten: *Gresham Life Assurance Society* v. *Styles* (5), at pp. 316, 321, and *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (2), at pp. 433, 458.

There is one other fact of importance which must be borne in mind. It is that the company was not discharging a debt or liability to the employees when it issued the 6,000 shares to them at par. The word "remuneration" has been more than once mentioned in this case as if it described the advantages which the employees were obtaining by the issue, and I think it has led to some confusion. If money or money's worth in any form, whether from capital or from income, is given to an employee in discharge of an ordinary trading obligation or debt due to him incurred in the course of the trade, and is accepted as such, I am quite ready to accept the view that the amount of the debt or liability so discharged will find its way into the profit-and-loss account on ordinary commercial principles, and will *pro tanto* reduce the profits for the year, for income tax purposes. A man's salary, with his consent, can be paid in meal or malt as well as in money, and that salary is one of the items of expenditure which go to reduce the amount of the profits and gains. If, in this case, the employees were paying the par value of the shares, and also releasing to the company some amounts of salary due to them, the case would be very different from what it is. All we really have before us is that the company has chosen to issue 6,000 shares at par to the employees, who have received the benefit of that issue. There is really nothing more. The employees have given up nothing. The company has not lost, or parted with, any asset. It has a fewer number of shares remaining for issue, but, of course, it can create as many more as it pleases. There is here, in my opinion, no transaction of trade at all, nor an item of any kind, which ought to be carried to either side of the profit-and-loss account. If the company, apart from the issue of the 6,000 shares, made a profit of £500,000 in the year in question, I am myself wholly unable to understand how it can be said that that profit has been reduced to the extent of a farthing, much less £11,625, by reason of the fact that the company has 6,000 fewer shares to issue to the public. The company cannot, even if it would, deal in its own shares, and the latter do not partake in any sense of the nature of stock in trade. The issue of shares by a company, whether at par or over, does not affect the profits or gains of the company for the purposes of income tax.

My Lords, if there were no authorities to be considered, and if the Court of Appeal had not expressed a different view from mine, I should have been tempted to leave the matter there, for, in its essence, I think it is only necessary in this case to ascertain the profits and gains on ordinary commercial principles. Out of respect to the Court of Appeal, however, I must now deal, I fear at some length, with some at least of the matters and the cases which have, as I think, led them to a wrong conclusion. I think it is clear that the premiums obtained on an issue of shares are not items of receipt in the account of profits and gains. It must then be asked what the event is which is alleged in this case to entitle the respondents to treat the amount of these premiums as a disbursement or expense wholly and exclusively laid out or expended for the purposes of the trade (Sched. D, Cases I and II, r. 3). The contentions of the taxpayer are set out in para. 13 of the case stated. It is said in effect that the amount of the premiums is "an amount forgone" by the taxpayer because the shares were issued at less than their market value to the employees as "remuneration" for their services, or, alternatively, that, if the company had issued the shares in the open market, it could have utilised "the premiums" for the purpose of paying "the aforesaid remuneration," and could then have debited the amount for the purpose of computing its profits for income tax purposes. These are, I think, quite distinct reasons. To the first, I think that the short answer is that an "amount forgone" is not (with one special exception) deductible, and that there is no principle under which such a sum can be treated as a disbursement or expense of the trade. To the second, the reply is that one must look at the events which have happened, and not at those which never happened, and that there is nothing to show that the premiums in question will ever be obtained by anyone either in the year of assessment or in any subsequent year.

The first point seems to be founded on an expression used by Lord Sumner in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (2), at p. 469. The material question—material for our consideration—in that case was whether a brewery company which had, wholly and exclusively for the purposes of its trade, acquired licensed houses which it let to tied tenants at rents substantially lower than their full letting values was entitled to deduct as expenses incurred in earning its profits the differences between the Sched. A assessments and the rents paid by the tenants. Lord Sumner observed, at p. 469:

> A trader who utilises, for the purpose of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade.

A little lower on the same page he says:

> In principle, therefore, I think that in the present case rent forgone, either by letting houses, which the brewers own, to tied tenants at a low rent instead of to free tenants at a full rack rent in the open market, . . . is money expended within the first rule applying to both of the first two cases of Sched. D.

My Lords, with all respect to the memory of a great judge, I cannot help saying that the reference to chattels in the first sentence must be due to a slip, and, moreover, I do not think that the sentence in its wide form can possibly be supported. None of the other opinions gave any countenance to it, and it was certainly not necessary for the decision of the appeal. The second sentence contains the words "rent forgone," but I think that the words in their context mean only rent which might have been, but was not actually, received. The decision, so far as it concerned the point as to a deduction for rents, was in truth governed by the previous decision of this House in *Russell* v. *Town & County Bank* (4). I am spared the duty of stating the results of that case, because in *Usher's* case (2) Lord Parker stated, at p. 460, with his usual lucidity and acuteness, the three points on the construction of the rule applicable to Cases I and II which were decided in *Russell* v. *Town & County Bank* (4). The third point decided was that:

> . . . the first part of [r. 3 (*a*)] which prohibits deductions for disbursement and expenses, not being money wholly and exclusively expended for the purposes of the trade, does not preclude a deduction for the annual value of premises used wholly for the purposes of the trade, *though such annual value is not money expended in the ordinary sense of the word.*

The italics are mine. The reason for this decision, surprising as it is at first sight, is to be found in the opinion of Lord Herschell in *Russell* v. *Town & County Bank* (4), at p. 425. It depends on the particular provisions of the Income Tax Acts. Lord Herschell said, at p. 425:

> It is quite true that, strictly speaking, the annual value where the premises are owned and not rented, is not money laid out or expended for the purposes of the trade, but it is admitted, and must, I think, have been admitted, that in either the one way or the other that deduction is to be made, because inasmuch as it is clear that even in the case of a dwelling-house a part of which is used for purposes wholly unconnected with the trade, the annual value of the portion which is used for the purposes of the trade is to be deducted [that is, under r. 3 (*c*)], it is evident that it can never be contended that in the case of premises used not for the purpose of a dwelling at all but exclusively for trade purposes, the annual value is not to be deducted.

This reason is, I think, decisive, but it seems to me to be beyond doubt that there is no ground for extending this artificial and unusual construction of the rule to anything beyond the annual value of premises exclusively used for business purposes, and that *Usher's* case (2) has no application in the present appeal. The ground of the decision, as the opinion of Lord Davey in the earlier case clearly showed, is limited to premises used exclusively for the purposes of the business. I do not understand how the reasoning of those cases can throw any light upon the present case, and I am unable to agree with Sir Wilfrid Greene, M.R., that *Usher's* case (2) is laying down some broad, though undefined, principle which may extend to all sorts of cases in which the taxpayer has "forgone" a profit. Where are we to stop? If a company chooses to make a sale of goods at cost price to a subsidiary company, is the former to be allowed to make a deduction of the difference between market value and cost price in its profit-and-loss account on the ground that it is profit forgone? I do not believe that anyone would so contend, but, for myself, I am unable to think of any concrete example of a "profit forgone" in relation to goods and chattels or services rendered which would stand the test of justifying the deduction on ordinary business principles.

If we turn to the second point, it is to be observed that it is only in an exceptional case that either the Crown or the subject is entitled to claim on the basis of a transaction which has not taken place. There are no doubt cases where, for example, a payment in cash is deemed to be the result of an accord and satisfaction. One need not pass cheques backwards and forwards across a table. However, we have nothing of that kind here. The company was issuing the shares at par, without any juggling with cheques. It was a plain straightforward offer and acceptance of shares at par, followed by an allotment. It is said by Sir Wilfrid Greene, M.R., that the company has remunerated its employees to its own financial prejudice by giving to them the money's worth of the premiums on the shares allotted to them. I would prefer to say "has made a present to its employees." The words "to its own financial prejudice" do not I think, advance the argument, for all it means is that certain shares have been issued at par while they might have been issued at a higher price. How does that lead us to the conclusion that moneys have been "laid out or expended" for the purposes of the trade? For myself, I do not think that the premiums which might have been obtained are "money's worth" in the sense in which those words are generally used—that is, as an equivalent for cash paid by the company—and, in my opinion, that view is supported by the case to which I must next refer. However, whether or not that is so, it seems to me clear that in this case the sum of £11,625 which the company never obtained was not in any sense laid out or expended for the purposes of the trade.

My Lords, I think that this House in *Hilder* v. *Dexter* (6) decided by necessary inference that, although a premium obtained by a company on an allotment of its shares is obviously money belonging to it, and is *prima facie* part of the capital of the company, nevertheless the advantage which an allottee of shares at less than the market value of the shares obtains is not either money or money's worth belonging to the company, nor is it part of the capital of the company. That was a decision on

the Companies Act, 1900, s. 8 (2). The EARL OF HALSBURY, L.C. took the responsibility for its drafting (*Hilder* v. *Dexter* (6), at p. 477), but I cannot say that the section is an example of lucidity, and it is necessary to study the case with some care to discover precisely what was being decided. Sect. 8 (1) states the conditions under which a company might pay a
A commission to a person in consideration of his agreeing to subscribe for shares. It required disclosure, and provided a limit of the amount. Subsect. (2), stated shortly, runs thus :

> Save as aforesaid no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission . . . whether the
> B shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

The section, therefore, prohibits the payment of such a commission out of shares of the company or money coming from the allotment of shares
C in the company and out of any money belonging to the company, with, however, the possible exception of the earned profits of the company. The opinion of LORD DAVEY, concurred in by the EARL OF HALSBURY, L.C., and LORD ROBERTSON, shows this quite clearly, though he does not mention the possible exception to which I have referred. He points out, at p. 480,
D that the words " apply any of its shares or capital money " include money derived from the issue of shares. Also at p. 480, a little lower down, he observes that the company in the case before the House was not indeed " parting . . . with any moneys belonging to it (the company)." He then had to deal with the words " directly or indirectly." The
E argument was that this prevented the company from :

> . . . applying or using its shares in such a manner as to give [the person promising to subscribe for shares] a possible benefit at the expense of the company in this sense, that it forgoes the chance of issuing them at a premium.

Here we come across precisely what is said in this case. LORD DAVEY,
F however, deals with the point by saying that there is no law [p. 480] :

> . . . which obliges a company to issue its shares above par because they are saleable at a premium in the market . . . [and that] the benefit to the shareholder from being able to sell his shares at a premium is not obtained by him at the expense of the company's capital.

If this House had regarded the transaction as one in which the company
G was giving " money's worth " in the sense of an equivalent for cash in consideration of the promise to subscribe for shares, the decision would have been the other way. The words " directly or indirectly " would have been in point. On the other hand, there is no doubt at all that a man who gets a share standing in the market at £2 3*s*. 9*d*. for the sum of 5*s*. is
H himself getting an advantage of considerable value. The point of *Hilder* v. *Dexter* (6) for the present purpose is that he is not getting it in any true sense at the expense of the company, though no doubt the company has forgone the chance of making a profit.

The decision of this House in *Salmon* v. *Weight* (1) is also invoked by the respondents. It was there held that directors could properly be assessed on the premium value of shares in their company for which they had been given the privilege of subscribing. Since the allottee at par of shares standing at a premium is plainly getting an advantage capable of being turned into money, it is easy to arrive at the conclusion that, if Sched. E applies to him, the market value of the shares less the amount he pays is within the wide words of Sched. E, r. 1, "Salaries, fees, wages, perquisites or profits whatsoever." I can see no difficulty in that case, but I have a difficulty in appreciating its application to the one before us. It depended on the language of the rules applicable to Sched. E, while the problem which arises under Sched. D seems to me to be a very different one, since it concerns profits of a trade, and is subject to a large number of prohibitions as to the deductions which alone are permissible, and on other statutory rules of some complexity.

It is, of course, clear that, if a company owing, say, £500 to an employee for his contractual salary agrees to deliver to him so many tons of coal or any other marketable commodity in discharge of the £500, the company would then be entitled to deduct the £500 as an expense. I mention this only for the purpose of remarking that it is not the present case. Numerous other questions have been raised as regards the giving of coal and other commodities to employees. I do not wholly agree with what the Court of Appeal has said in relation to those matters, but I do not think they arise on the present appeal, and, for my part, I think that it will be wiser not to express an opinion on them.

In conclusion, I return to the view which I expressed earlier in this judgment. A company, generally speaking, can issue its shares at any price it likes, not being less than par. This is not a trading transaction, and does not in any way affect its gains and profits under Sched. D. In the present instance, the shares were issued at par to certain employees in order to give them an interest in the company, but not in payment of any sum contractually due to them. In these circumstances, the respondents have failed to establish that any sum has thus been expended or laid out for the purpose of the trade of the company. My Lords, it follows, in my opinion, that the appeal should be allowed.

LORD RUSSELL OF KILLOWEN: My Lords, the respondents in this case claim that, in computing the profits of their trade assessable to income tax, there should be deducted a sum which they have not disbursed, and in respect of which they have incurred no liability. I will not recount all the facts. They have already been stated. I must, however, call attention to one important matter. The claim is made upon the footing that the sum in question represents remuneration paid by the respondents to their servants, but the transaction as evidenced by the documents does not, I think, warrant this terminology. The sum in truth represents the premium on certain shares which the respondents might have issued to the public at a price above par, but which they elected to offer to their servants at par, in order to induce them to become shareholders, and, therefore, servants directly interested in the welfare of the company. That is an accurate description of the transaction. The hope and intention were that the servants should keep the shares. No doubt the servants had it in their power to sell and obtain a premium from their purchasers. No doubt, too, they, or A such of them as were liable to income tax, would be taxable on the benefit which accrued to them from the allotment at par. These, however, are considerations irrelevant to the question which we have to determine—namely, whether the respondents are entitled to deduct as a trade expense a sum equivalent to the premium at which the B respondents might, had they so chosen, have issued the shares. The Court of Appeal answered this question in the affirmative, but, in my opinion, the deduction is not permissible. I have considered with care the judgment delivered by SIR WILFRID GREENE, M.R. It rests, I think, on two foundations, one that the respondents transferred money's worth C from themselves to their employees, the other that, upon the authority of *Usher's* case (2), the premium which the respondents elected not to obtain was a "profit forgone" which they were entitled to enter on the expenses side of their trading account in ascertaining their trading profits. It is true that SIR WILFRID GREENE, M.R., emphatically D disclaims any assertion of the general proposition that money forgone is money expended, but the exact limits within which the proposition may apply are not very clearly marked.

There is no difficulty about the cases, indicated in the course of the judgment, in which a servant is remunerated in kind. The value of E the "kind" must be deducted in ascertaining the profits of the trade, subject, however, to the fact that, if the "kind" is part of the trader's stock in trade, further entries must be made in the account if it is desired to ascertain the profit made by the realisation of all the stock in trade realised, for the "kind" which is applied at its value in remunerating F the servant is stock in trade realised just as much as if sold at that value to a customer. The value of the "kind" should, I think, be included in the receipts as representing a realisation at the value at which it discharges *pro tanto* the servant's salary, and the expenses should include, in addition to the cost of the whole stock in trade, an item G representing the whole amount of that salary. I am throughout assuming that the cost is lower than the market value. Transactions such as that, however, do not represent what in fact happened in this case. Here the respondents, in my opinion, parted with nothing. They transferred no assets of theirs to the servants. The power of a limited company to H issue and allot shares is not an asset of the company. It is only a power to increase its issued capital and, it may be, the number of the corporators. It is not bound to issue its shares for more than their nominal value. LORD DAVEY said, in *Hilder* v. *Dexter* (6), at p. 480;

> . . . the argument seems to be that the company, by engaging to allot shares at par to the shareholder at a future date, is applying or using its shares in such a

> manner as to give him a possible benefit at the expense of the company in this sense, that it forgoes the chance of issuing them at a premium. With regard to the latter point, it may or may not be at the expense of the company. I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide. But the point which, in my opinion, is alone material for the present purpose is that the benefit to the shareholder from being able to sell his shares at a premium is not obtained by him at the expense of the company's capital.

I am of opinion that the first basis of the judgment of the Court of Appeal fails, because the respondents transferred neither money nor money's worth to their servants. They merely elected not to obtain more than the nominal value of the shares in order to induce the servants to become shareholders in the company. I cannot hold (apart from compelling authority) that such action by the respondents is, or may be treated as, a disbursement or an expense, or that the premium which the servants could, if they wish, obtain from purchasers of their shares is, or may be, treated as money laid out or expended by the respondents for the purposes of the respondents' trade.

It is said, however, that compelling authority does exist in the decision of your Lordships' House in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (2), and I now proceed to consider this question.

The matters there in debate which are relevant to the present case were two—namely, (i) the freehold tied houses which the brewery let to tenants at rents lower than the Sched. A assessment, and (ii) the leasehold tied houses which the brewery sublet to tenants at rents lower than the rents paid by the brewery to the freeholders. It was held that, in ascertaining its profits, the brewery could charge as an expense (in the first case) the difference between the rents paid by the tenants and the Sched. A assessment, and (in the second case) the difference between the rents paid by the tenants and the rents paid by the brewery. In other words, the receipts side of the account included the smaller sums of rent received by the brewery, while the expenditure side included the larger sums representing (i) the annual value of the freeholds and (ii) the rents paid by the brewery. Three things may here be noted. First, so far as concerns the leaseholds, the position seems to present no abnormal features. It is a plain case of entering actual income and actual outgoings. Secondly, the great difficulty arose as to the freeholds, in regard to which no actual disbursement or expense was made or incurred by the brewery which could be described as money laid out or expended for the purposes of the trade. Thirdly, it was never suggested that anything beyond the Sched. A assessment—e.g., the amount of a potential rack rent—could be charged as an expense. It is in regard to the decision concerning the annual value of the freeholds that I propose to consider the case. This House decided that the annual value could properly be entered as an expense, or, to put it in other words, that the difference between the larger amount of the brewery's assessment under Sched. A and the smaller amount of the rent received from tied tenant was deductible in ascertaining the brewery's profits for the purposes of income tax. It is important to see how this result was achieved, because it is upon the authority of *Usher's* case (2) that A the Court of Appeal has relied. Just as in *Usher's* case (2) "rent forgone" was held to be money wholly and exclusively expended by the brewers for the purpose of the trade, so, it is said, the premium here forgone by the respondents is money wholly or exclusively expended by them for a similar purpose. Such, as I read the judgment, is the view expressed.

B When examined, *Usher's* case (2) will prove to be founded, and, I think, entirely founded, on the earlier decision of this House in *Russell* v. *Town & County Bank* (4). LORD PARKER OF WADDINGTON in *Usher's* case (2) said in terms that it was covered by that decision. The question C there was whether, in ascertaining the profits of a bank, the annual value of the whole of the bank premises was deductible, including that part of them in which the bank manager resided. The difficulty of treating the annual value as a disbursement or expense, or as money laid out or expended for the purpose of the trade, was fully appreciated, but D the difficulty was overcome, and it was treated as a permissible deduction by reason of the fact that the provision of the 1842 Act (which corresponds with the present Sched. D, Cases I and II, r. 3 (*c*)), showed that, in appropriate circumstances, annual value might be deducted. LORD HERSCHELL made this clear when he said, at p. 425:

> E It is quite true that, strictly speaking, the annual value where the premises are owned and not rented, is not money laid out or expended for the purposes of the trade, but it is admitted, and must, I think, have been admitted, that in either the one way or the other that deduction is to be made, because inasmuch as it is clear that even in the case of a dwellinghouse a part of which is used for purposes wholly unconnected with the trade, the annual value of the portion which is used for the purposes of the trade is to be deducted, it is evident that it can never be F contended that in the case of premises used not for the purpose of a dwelling at all but exclusively for trade purposes, the annual value is not to be deducted. The annual value is, therefore, to be deducted somehow. It is to be deducted either by taking it as an element before arriving at the balance of profits and gains, or as included in a very broad construction of the provision relating to disbursements and expenses.

G Having thus laid the foundation of the right to deduct the annual value of premises wholly used for bank purposes, LORD HERSCHELL then held that the fact of the bank manager residing in part made no difference, because that part too was used for the purposes of the bank's business, and, further, that the premises in question were not a dwelling-H house within the special statutory provision in that behalf. As I read the decision, the right to deduct the annual value of land used for the purposes of trade, whether as a necessary element in arriving at the balance of profits and gains of the trade or as included under a broad construction of disbursements and expenses, is based upon, and justified by, the existence of the express provision now represented by r. 3 (*c*).

Both cases are decisions dealing with the ownership by the trading company of land in which r. 3 (*c*) or its predecessor came into consideration as a reason for allowing the annual value to be treated as a permissible deduction. Neither is an authority extending beyond that, and, in my opinion, *Usher's* case (2), founded as it is on *Russell* v. *Town & County Bank* (4), does not justify the deduction which is claimed by the respondents. It is true that the language used by Lord Sumner, and quoted by Sir Wilfrid Greene, M.R., is far-reaching, and extends even to chattels. Indeed, if taken literally, it would lead to some startling results. The other members of this House who took part in the debate used no such wide language, and I for one am not prepared to extend the decision so as to cover the wholly different facts of the present case. Both these decisions relate to the annual value of land, to which peculiar considerations are applicable, and I am unable to see how the reasoning in either of these two decisions of your Lordships' House can be applied to a case like the present, in which the claim is to deduct a sum which never came into existence because the respondents, in order to achieve a desired result, elected to issue some shares at their nominal value.

As a last argument, it was urged that, apart from *Usher's* case (2) and the rules, the deduction was permissible on general commercial principles. I do not agree. If the respondents had issued the shares at a premium, no trace of the transaction would appear in the profit-and-loss account. I find difficulty in understanding how on any principle, commercial or otherwise, one may, by electing not to get a sum, become entitled to charge as an expense in one's profit-and-loss account the amount of the sum which, if one had got it, could not have been included therein as a receipt. I am of opinion, for the reasons which I have endeavoured to indicate, that this appeal should succeed.

Lord Wright: My Lords, the question in this appeal is whether the respondents are entitled to deduct as an expense from their profits, or, to state it differently, as a proper item in the ascertainment of the balance of profits and gains in the year of charge, the difference between the market value and the par value of 6,000 shares which they allotted to certain of their employees as extra remuneration. The Court of Appeal, agreeing with the experienced city commissioners, but reversing the decision of Macnaghten, J., have held that they were so entitled. Save for the difference of opinion which has emerged among your Lordships, I should have been content without more to express my concurrence with the judgment of the Court of Appeal delivered by Sir Wilfrid Greene, M.R., which, to my mind, is (subject to some immaterial reservations or differences in emphasis) convincing and satisfactory. However, as things are, I feel that I ought to explain my reasoning at some length.

The respondent company, which is engaged in the diamond business, has been prosperous, and its shares, the par value of which were at the material time 5*s.* per share, were able to command in the market a price of £2$\frac{3}{16}$, or £2¼ when the new issue, of which the 6,000 shares in question formed part, was made. The case finds that the value of the remuneration for services represented by this issue of 6,000 shares to the employees was accordingly calculated at £11,625, based on the middle price of the day—namely, £2 3*s.* 9*d.*—less 5*s.* per share paid by the employees. This is a finding of fact by the commissioners, upon which they upheld the contention of the respondents that they were entitled to debit this sum in arriving at the balance of their profit and gains, the commissioners having further held that this offer of the shares to the employees was solely in the interest of the company. Whether or not the allotment was thus made by way of remuneration is a question of fact. I do not think that it is competent for the House to go behind it. In the course of the hearing before your Lordships, it was said that there was no evidence to justify the finding of fact, and, further, that the idea of remuneration was excluded by the terms of the letter in which the directors offered the shares as fully paid at 5*s.* per share in order to show their appreciation of the employees' special services by giving them an opportunity of acquiring a share interest in the company on reasonable terms. However, that letter is consistent with the commissioners' finding that the offer was by way of remuneration, even though it was not merely a reward for past services but had the further object of stimulating future efforts. Even if the latter were the sole element, however, and even if the word "remuneration" were not appropriate, it would not, in my opinion, affect the question whether the deduction was admissible. The deduction, if in other respects allowable, would be allowable as an outlay or expense incurred solely in the interest of the respondents' trade.

But for the divergence of opinion which has emerged, I should have been clear in my mind that the £11,625 claimed as a deduction was properly so claimed. If the respondent company had arranged with certain of their employees to satisfy their salary, or part of it, to the aggregate extent of £11,625 by the allotment of these shares at 5*s.*, instead of charging the market price, I do not see how it could be contested that the £11,625 was deductible as a trade expense. It would *pro tanto* wipe off trade debits for wages just as much as if it had been utilised to discharge any other indebtedness. Each employee, by the allotment of the fully paid shares, would be paid what was due to him to the extent of the difference between 5*s.* per share and the market value. He in truth receives a share or chose in action worth £2 3*s.* 9*d.* Though he has to pay 5*s.* for each share (because the company cannot issue the shares at less than par), that is really a deduction from the gross value which he receives, so that he is only paid, in the hypothesis imagined, £1 18*s.* 9*d.* in respect of each share. I shall not express the position as being that he obtains the power to realise a profit of £1 18*s.* 9*d.* What he gets is the share, and all the rights which it involves. He may realise it and turn it into cash, or keep it as an investment for income or appreciation. The payment of 5*s*. per share does not make the position in essence different from what it would be if the salary were being paid by a transfer of shares in a subsidiary company which were held by the respondents, and which they could transfer without any payment at all. The only difference is that in such a case the full market value of the shares, and not the market value less 5*s*. per share, could be reckoned A as the sum paid.

I cannot see any distinction between the case supposed where the shares are used to discharge a pre-existing debt for salary and the case where they are utilised to pay a bonus or extra remuneration. No doubt, in the former case, the value attributable to the share is expressly B liquidated on the footing of the amount of the debt. In the case of the bonus remuneration, the amount of the bonus is only determined by ascertaining the value to the employee of the share which he receives, which, in the present case, is the market value less 5*s*. per share. However, I see no difference. In fact, the recipient is taxed on precisely C this basis, as in respect of profits of his office. This practice, which was followed in the present case, has the authority of this House in *Salmon* v. *Weight* (1), where directors, who had been allotted at par by way of remuneration fully paid shares which stood at a premium in the market, were taxed on the difference between the market value and D the par value. The question from the point of view of the recipient who is taxed under Sched. E is obviously different from that of the company on its profits under Sched. D, but it is at least clear that the recipient does obtain a profit. In my opinion, this profit so obtained was, on the facts found, at the expense of the respondents (if I may E use the word in its ordinary business sense), and even though in other cases, as Lord Davey points out in *Hilder* v. *Dexter* (6), at p. 480, the benefit which the recipient obtains may or may not be at the expense of the company in the sense that it forgoes the chance of issuing them at a premium. Lord Davey says, at p. 480: F

> I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide.

In the present case, any question of this nature is disposed of by the G findings in the special case, which states that the directors could have issued the shares in the open market at a premium, but offered them at par to the employees solely in the interests of the respondents' trade.

The respondents have parted with an asset at one-tenth of its value in order to further the interests of the company. The case states at H what price they could have sold the shares in the market. Most people would say that they gave them away, treating the 5*s*. per share as merely a mitigation of what would otherwise be a free transfer, or the difference between the 5*s*. per share and its market value may be regarded, to borrow the words of Lord Atkin in *Salmon* v. *Weight* (1), as a notional sum paid in order to remunerate the employees, or as a sacrifice made to promote the company's trading. However it is put, the benefit which the employees receive by having the shares at 5*s.* per share is at least in the facts of this case correlated with the corresponding expense incurred by the respondent company when they allotted the shares on these terms. It may be that this would be clearer if the difference were being used to pay a debt, as for definitely stipulated wages, but I can see no difference in principle. No doubt, in that event, as a matter of bookkeeping, the debt would appear on one side and the difference in value on the other side, but similarly here the extra remuneration paid should appear on one side, and the difference in value on the other side, of the account. It has been notionally received on capital account, and is being utilised on revenue account, just as would have been the case if it had been used to pay an ordinary debt. It is true that unissued shares are not an asset, in any sense, of the company. What value they have comes only when, and by the fact that, they are issued, just as a deed has no value, and, indeed, no existence, until it is signed, sealed and delivered, or a negotiable instrument until it is issued. Unissued share capital was described by LORD DAVEY in *Hilder* v. *Dexter* (6), at p. 480, as potential capital. The power to issue further capital is only a potentiality, but the fact of issue makes it actual capital, and creates the *fasciculus* of rights and liabilities between the company and the shareholder which flow from the share when issued. If the share stands at a premium, the directors *prima facie* owe a duty to the company to obtain for it the full value which they are able to get. It is true that it is within their powers under the Companies Acts to issue it at par even in such a case, but their duty to the company is not to do so except for good reason. Normally, they would transfer the difference between the market and the par value to a premium reserve or similar capital account, but they could justify issuing the share at par on the ground that the difference has been utilised to secure a benefit to the company, as here by paying the extra remuneration to the employees, and, it may be, also by giving them an interest in the company. In my opinion, when the directors did so, the company was incurring an expense on revenue account deductible as such under Sched. D in order to assess the balance of profits and gains. This is none the less so because the premium it acquired would have been, not a trading profit, but a receipt on capital account.

I think that there is authority in this House which in principle precisely covers this conclusion. I refer in particular to *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (2), where it was held that a trader who had transferred an interest of value at less than its full value in order to advance his trade was entitled, in estimating the balance of his profits and gains, to claim to deduct the difference between the full value and the amount which he thus received as being an expense necessarily earned for the purpose of earning the profits. The trade in question was that of a brewery company. In the ordinary course of that trade, the company was either owner or lessee of licensed houses, which it let to "tied" tenants, who, in consideration of the tie, paid a rent less than the full annual value. It was the difference between the rents and the full annual values which the company was held to be entitled to deduct as an expense of the trade under the rules applicable to A Sched. D, Cases I and II. **Earl Loreburn** shortly summed up the position thus, at p. **446**:

> On ordinary principle of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay.

B In the same way, in the present case the loss involved in allotting the shares at less than their market value for the purposes found by the commissioners is a sound commercial outlay, which the respondent company are entitled to bring into account. **Lord Atkinson** states, at p. 451:

> This is only another way of saying that the appellants let their tied houses at C a low rent solely and exclusively for the purpose of promoting their trade and enhancing the profits of it.

Later on, at p. 457, he compares what would have been the position if the brewery company, instead of putting a tenant into the tied house, had put in a manager. In the latter case, on the authority of *Russell* D v. *Town & County Bank* (**4**), the full annual value of the house would have been deductible. **Lord Atkinson** proceeds as follows, at p. **457**:

> . . . but the balance of the profits and gains of the brewer's trade would, according to the methods of practical business men, be ascertained in the same way in both cases, i.e., by deducting from the receipts what it cost to earn them. Part of the cost to the brewer is in the manager's case, his salary, and possibly a discount on E profits. In the case of the tenant it is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it, and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under Sched. A. For the purposes of striking the balance of profits and gains the two cases are in principle undistinguishable.

I draw special attention to these last words as showing conclusively F that nothing turned on any feature peculiar to landed interests in Sched. A. Earlier in his opinion, **Lord Atkinson** said, at p. **452**:

> If he [the trader] abstains from letting his premises and devotes them to the purposes of his trade he must be taken to have dedicated to that trade a sum equivalent to the annual sum which he might have obtained in the shape of rent G if he had let them to an untied tenant.

It is true that in that case the trade was different, and the subject-matter was different, but the difference between the brewer's trade and the diamond merchant's, and between the letting of houses and the allotting of shares, must not be allowed to veil what, in my opinion, is H the identity in principle. The undervalue deliberately incurred was a dedication of an equivalent sum to the purposes of the trade. **Lord Parker** speaks to the same effect. He points out that the brewers were claiming to deduct the difference between the Sched. A assessment and the rent they received, or the difference between the rent they paid and the rent they received, the former applying when they were freeholders and the latter when they were leaseholders. He says, at p. 463:

> Or in other words, they claim the Sched. A assessment value or the rent they pay as a deduction, giving credit on the other side of the account for the rent paid by the tenants of the tied houses.

He held that they were right in their contention, because it was a deduction not precluded by Cases I and II, r. 1, and necessary to ascertain the balance of the profits and gains in any true sense of that expression. However, he added, at p. 463:

> . . . the right to make the deduction, however, must of course carry with it the obligations to give credit for the rents received from the tenants of the tied houses.

I think that, notwithstanding certain objections which I shall consider later, this decision does in principle precisely apply to the case now in question. The brewers were letting their houses at an undervalue in order to promote their trade. They were held entitled to a deduction of the true value, subject to allowance for the rent which they actually received. Here the respondents are parting with their shares at an undervalue for the purposes of their trade. They are, accordingly, it seems to follow, entitled to a deduction of the market value of these shares, subject to an allowance for the par value which they actually receive. The sacrifice in *Usher's* case (2) was of the rents, in the present case of the market value of the shares, less in either case the credits. The fact that Sched. A applies to property in land does not, in my opinion, affect the position, save that the annual value under Sched. A takes the place of market value. LORD SUMNER puts this principle very clearly, at p. 469:

> Next as to the rent. A trader who utilises, for the purpose of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade. Equally he does so if he hires or rents for that purpose property belonging to another. The amount of his expense is *prima facie* what he could have got for it by letting it in the one case, and what he pays for it when hiring it in the other. Where he gets something back for it, while employing it in his trade, by receiving rent or hire for it in connection with that trade, the true amount of the expense can only be arrived at by giving credit for such receipt.

If the "expense" of letting houses at an undervalue for purposes of the trade is a deductible expense under Sched. D, I cannot see why in principle the expense of allotting shares at an undervalue for purposes of the trade should not equally be deductible under Sched. D.

It was objected, however, that *Usher's* case (2), like *Russell's* case (4), which to a certain extent it followed, related to rent, and that the principle enunciated in these cases was not general, but was limited to deductions in respect of rent. It was sought to maintain this proposition by reference to the rules applicable to Sched. D, Cases I and II. The contention was that this House decided the two cases referred to, not on any general principle, but on the specific terms of the rules which relate to rent or annual value. In the Acts before 1918, these rules were, for practical purposes, identical with what is now to be found in

r. 3 (*c*) and in r. 5, and I shall accordingly refer to the modern rules. Rule 3 (*c*) deals with the rent or annual value of a dwelling-house, and prohibits any deduction in that respect except for such part as is used for the purposes of the trade or profession, etc., of the person claiming the deduction. Rule 5 provides that the computation of the tax shall be exclusive of the profits and gains arising from (or, since 1927, of the annual value of) lands, tenements and so forth occupied for the purpose of the trade or profession, etc., of the person being assessed, and separately assessed, under Sched. A. I may note in passing that in *Usher's* case (2) the tied tenant, and not the brewers, was the occupier of the premises. After a careful study of the rule and of these two authorities, I can find nothing to justify putting this limited interpretation on the principles laid down. I do not wish to repeat all that was said on this point by Lord Herschell in *Russell's* case (4), or by the various Lords, especially Lord Parker, in *Usher's* case (2). The rules do certainly present a curious example of draftsmanship. The governing principle, however, is that the assessment is to be on the balance of the profits and gains. Rule 1 provides that the tax shall be charged without any deduction other than is by the Act allowed. Rule 3 (*a*), which is the most general in its terms, provides as follows:

> . . . no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation . . .

One major question debated both in *Russell's* case (4) and in *Usher's* case (2) was whether there could be a deductible expense when there was no outlay in money, but merely the sacrifice or surrender of something of value wholly for the purpose of the trade. This was true of the rent of the manager's residence in *Russell's* case (4), where the whole rent was forgone, and of the rent in *Usher's* case (2), where only a part was forgone. The decision in both cases was that the money value of the rent forgone was deductible, and that in *Usher's* case (2) the partial payment made no difference, save that the amount deductible had to be reduced *pro tanto*. Lord Herschell, after examining the rules thus concludes, at p. 425:

> The annual value [of the premises occupied by the bank manager] is, therefore, to be deducted somehow. It is to be deducted either by taking it as an element before arriving at the balance of profits and gains, or as included in a very broad construction of the provision relating to disbursements and expenses.

He means in that phrase that there is a disbursement or expense within the rule, though not in a literal sense, since money has not been expended. In *Usher's* case (2), Lord Parker arrives, at p. 460, at a similar conclusion. He deals with the prohibition against any deduction for the rent or value of a dwelling-house except such part as is used for the trade, and points out that the rule refers only to a dwelling-house occupied by the person to be assessed. He summed up the position thus, at p. 460:

> In other words, the effect of the prohibition cannot be extended by implication

to cover a deduction for rent or annual value which would otherwise be a proper deduction in ascertaining the balance of profits and gains.

He states his general view of the law on this point thus, at p. 458:

> The better view, however, appears to be that, where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought A to be allowed, notwithstanding anything in the first rule or in sect. 159 [of the Act of 1842] provided there is no prohibition against such an allowance in any of the subsequent rules applicable to the case . . .

In my opinion, LORD PARKER is clearly deciding the case in general principles, and not on any particular feature attaching to rent or annual value. LORD SUMNER expressed this view quite specifically in the B passage I have quoted. The reference by EARL LOREBURN to "sound commercial outlay" again put the principle. So also did LORD ATKINSON in the passage I have quoted. The particular analogy he draws between the manager's salary and the reduced amount of rent shows that he was enunciating a general principle.

C In *Hoare & Co., Ltd.* v. *Collyer* (3), the principle in *Usher's* case (2) was considered by this House, the issue being whether or not the loss by brewers on the lettings of some tied houses could be set off against the profit on others. This House decided against such aggregation of gains and losses, but all their Lordships summed up the effect of *Usher's* D case (2) in substantially the same terms. I shall quote the language of LORD ATKIN, at p. 416:

> Whether the expense allowed in *Usher's* case (2) is based upon a deduction of the Sched. A valuation as on premises used in the brewers' business, mitigated by the sum received from the tied tenant, or whether it is regarded as a notional sum paid for the advantage of the tie, it is allowed as an expense incident to the particular E house in respect of which it is incurred. It in no way differs from expenses for repairs or compensation levy or insurance premiums on particular houses such as are also authorised by the same decision.

In the same case, LORD TOMLIN said, at p. 419:

> In *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (2), where tied houses of a brewery company were held by the tenants at rents below the Sched. A valuations, your F Lordships' House, as I understand the case, treated the difference between the rent and the valuation in the case of each house as rent forgone, or money spent exclusively for the purpose of earning profits, and held that expense to be one which could be deducted for the purpose of ascertaining profits and gains under Sched. D.

The other Lords who took part in the appeal spoke to the same effect. G It is difficult to see what Sched. A has to do with this kind of question, except as fixing the limit of annual value. Sched. A deals with the assessment of the charge on the landholder. The deductions now being considered are deductions under Sched. D in respect, not of landowning, but of a trade or business. The two schedules are disparate and distinct.

H One other case to which I must refer is *Salmon* v. *Weight* (1). I regard that case as the counterpart of the present, though it is not a direct authority, because the question there turned on the different language of Sched. E. It dealt with the position of the recipient, and not that of the payer. The company there had allotted shares to its directors at par, which was considerably below their market value. As the allotment was found to be by way of extra remuneration for their services, it was held that the directors (or, at least, the director who was concerned in the case) were taxable in respect of the value of that remuneration under r. 1 of Sched. E. LORD ATKIN, in delivering the opinion of this House, said that the difference between the price paid and the value of the shares was an immediate profit in the nature of money's worth, and put as an analogy a case where a director of a colliery company, himself engaged in the coal trade, was given the privilege of buying coals at one-third of their market price. That would clearly be a profit or perquisite of the office. However, as SIR WILFRID GREENE, M.R., observed in the judgment appealed from, it would be a startling inconsistency to say that the director was to be taxed because he was receiving by way of remuneration money's worth at the expense of the company, and yet that the company which was incurring the expense for purposes of its trade to remunerate the directors was not entitled to deduct that expense in ascertaining the balance of its profits and gains, whether the matter is dealt with as an expense under the specific rules applicable to Sched. D, Cases I and II, a course which would be justified by the opinions expressed in *Usher's* case (2), or, alternatively, under the general right to deduct expenses, according to the ordinary principles of commercial trading.

It is true that, in certain cases, an employee who has received a benefit from his employment may not be assessable in regard to the value of it. Thus in *Tennant* v. *Smith* (8), a bank manager or agent, who was in the same position as that of the manager or agent in *Russell's* case (4), was held not to be assessable in respect of the privilege of free residence, in particular because he was not free to dispose of that advantage or turn it into cash. LORD MACNAGHTEN said, at p. 163:

> [Sched. E] extends only to money payment or payments convertible into money.

As LORD WATSON said, at p. 159, it extends only to:

> . . . money—or that which can be turned into pecuniary account.

The decision of this House in *Weight's* case (1) clearly involves that the acquisition by the recipient of the shares involved a benefit convertible into money—that is, to the extent of the difference between the par value and the market value. It seems to follow that an equal sacrifice expressible in terms of money must have been suffered by the respondents. To that extent, *Weight's* case (1) directly supports the respondents' case.

It was contended, however, that, though the employee may profit, the company is at no expense, and is not out of pocket, when it issues shares at par by way of remuneration or for a special purpose in the interest of its business, because the company is involved in no expense, since to allot shares at par, instead of at their market value, costs the company nothing. It is true that the directors would not be breaking any provision of the Companies Acts if they allotted shares at par instead of realising their market value. They might do so for some legitimate reason—for instance, to give a bonus to the extent of the price difference to shareholders, or to remunerate employees, or to discharge a debt of any kind. Otherwise, the shareholders might complain that, by so issuing shares at less than the market value, the directors were wasting the assets of the company if they were not getting A something in return, or had no good reason for so doing, or at least did not *bona fide* think that they had. It is said, however, that shares are not an asset of the company. I agree, as I have already observed, that unissued shares are not an asset of the company. However, in the useful phrase of LORD DAVEY in *Hilder* v. *Dexter* (6), they are potential B capital. The company which has the right to issue them has a right which it can turn into money, and the amount of money which it can derive from the issue depends on the market. The question is not what the shares cost the company, but what they were worth to the company, in the sense that it was open to the company to derive the full market C value, either by selling on the market or by allotting at an undervalue as fully paid shares for some special consideration or object in the company's interest. No one, I imagine, would deny that, if the company had been possessed of bonus shares in a subsidiary company which had cost them nothing, the value to them of these shares was their market D value, and that, if the company used these shares to pay a debt or satisfy an obligation in the course of the company's trading, their value could be deducted in ascertaining the balance of profits and gains. I see no difference in principle between that case and the present.

In my opinion, *Hilder* v. *Dexter* (6) either does not throw any light E on the question whether in this case the company has incurred an expense or, perhaps more accurately, supports my view, for the reason which I stated in citing it above. The sole question there was whether an allotment of shares at par fell, on the facts of the case, within the Companies Act, 1900, s. 8 (2), which prohibited a company F from applying, either directly or indirectly, any of its " shares or capital money " to the payment of commissions and similar matters, save as provided in the Act. A shareholder who had taken up shares did so in the terms of an agreement that he should have the option at a later date of taking up a certain number of shares at par. He exercised the G option when the market price was above par. The company fulfilled its contract, and it was held that the section was not contravened. LORD DAVEY construed the words " shares or capital money " as meaning [p. 480]:

> . . . its capital, either in the form of shares before issue, when they may be described H as potential capital, or in the form of money derived from the issue of its shares . . . the point which, in my opinion, is alone material for the present purpose is that the benefit to the shareholder from being able to sell his shares at a premium is not obtained by him at the expense of the company's capital.

This, in my opinion, is merely a decision on the particular words of the Act, and affords no guidance in this appeal. Indeed, it seems clear that, in the events which happened, the capital was not being reduced, nor had there been any outlay of moneys, capital or otherwise, by the company, nor any application of shares or capital money, to the payment of commissions and so forth. The company was simply fulfilling its contract. The words of the Act are narrow.

I must not be taken to say that a profit forgone is in every case the same as an outgoing or expense, or that money's worth is always to be deemed to be the same as money, but I think that, on the facts of the present case, and for the purposes of determining the deductions permissible for the respondents under Sched. D, both propositions may be asserted. For all these reasons, which in substance are the same as those stated by Sir Wilfrid Greene, M.R., in the Court of Appeal, I think that the decision of the Court of Appeal was right. I regret that I find myself unable to agree with those of your Lordships who are of a different opinion.

Lord Romer: My Lords, the findings of fact in this case by the commissioners for the general purposes of the income tax for the city of London are not as clear as could be wished upon the question of what was the object of the directors in making the allotment of shares to the employees of the respondent company. In para. 2 of the case stated, the shares are said to have been alloted as "remuneration for services." So, too, in para. 10. In para. 13, which sets out the contentions of the company, the difference between the par value and the market value of the shares is alleged to represent remuneration for the services of the employees, and no exception to this allegation appears to have been taken by the appellant in his contentions as they are set out in para. 14. The fact that one of the objects of the directors in making the allotments was to remunerate certain of the employees for past services is made apparent by the directors' letter of June 15, 1934:

> The directors desire to show their appreciation of special services you have rendered to the company by giving you an opportunity to acquire a share interest in the company on favourable terms.

It is plain, however, that there was much more in it than this. In para. 12 of the case, the commissioners refer to the evidence given by the secretary of the company, evidence which the commissioners must be taken to have accepted as true. It included the following statement:

> The offer of shares made by the directors to the employees was solely in the interests of the respondents' trade.

That statement would hardly be made about an offer of shares merely in recognition of past services. It was, however, obviously in the interests of the company's trade that its employees should, by becoming shareholders, acquire an incentive to promote the success of the company, and the directors seem to have realised that, if the employees were to become shareholders, it would be advisable to offer them some inducement to do so. Hence the reference in the letter to the "favourable terms" offered to the employees in allowing them to take up the shares at par. If the shares were being offered merely in recognition of past services, it would be a matter of indifference to the company or its directors whether or not the employees accepted the offer. One does not usually hold out inducements to a person to persuade him to accept A a present.

In these circumstances, the proper conclusion to be drawn from the facts set out in the stated case seems to me to be that, in order to induce some of its employees to take up shares in the company, the directors, in the interests of the company's trade, offered such employees B at 5*s*. per share 6,000 of its shares, for which the directors could have obtained £2 3*s* 9*d*. each from the public, had they wished to do so. That such a transaction would have involved no breach of the Companies Act, 1929, s. 45, is plain. The company would not have applied any of its shares or capital money, either directly or indirectly, in con- C sideration of the employees' subscription for the 6,000 shares: *Hilder* v. *Dexter* (6).

However, the question to be decided upon this appeal is whether, in computing its profits for income tax purposes, the company is entitled to deduct an amount representing the difference between D the par value and the market value of the 6,000 shares, that being the benefit which accrued to the employees as consideration for their subscribing for the shares. That the question is one of considerable difficulty is apparent from the fact that it has given rise to a difference of opinion between the courts below and also between the members of E this House, but, having given the matter my anxious consideration, I have formed a very clear opinion that the question should be answered in the affirmative.

My Lords, it has been laid down on more than one occasion by this House that, in order to ascertain whether, in computing the profits of F a trade for the purposes of the Income Tax Act, 1918, Sched. D, Case I, a particular deduction is permissible, the profits must be ascertained on ordinary commercial principles by setting against the income earned what it has cost to earn it, provided always that, as regards each particular item of cost, its deduction is not expressly prohibited by the terms of the G Act and rules. It becomes necessary, therefore, to inquire in the present case whether, in ascertaining the profits of its trade on ordinary commercial principles, it would be permissible to deduct the sum in question as forming part of the cost of earning the company's income.

It must, of course, be conceded that the sum never formed part of H the assets of the company. It was, nevertheless, a sum that could have been made an asset, had the directors decided to issue the 6,000 shares to the public at the market price. The company, therefore, had the power of acquiring such a sum. I have never consciously committed, and I trust that I may never commit, the great sin in a lawyer's eyes of confusing property with power. If a man has a general power of appointment over a sum of money, the sum does not, strictly speaking, form part of his assets. Should he release the power voluntarily, his assets will be in no way diminished. He will not have parted with a farthing, but he will nevertheless be the poorer for having released the power. So, too, in the case of a company whose shares stand at a premium in the market. The directors may, if they think fit, and if A they act in good faith, issue the shares at par. In such a case, they in effect voluntarily release the power of the company to acquire the premium. The company parts with none of its money, but it is nevertheless the poorer for the release, for, not only does the company give up, by the release, the opportunity of adding to its assets a sum in B cash, but it also gives up the opportunity of utilising the possession of the power for the purpose of adding directly to its stock in trade, or for the purpose of preventing a diminution of its existing assets. Where a company issues its shares at a premium, the premium is a receipt on capital account. It is not a trading profit, and it is not chargeable with C income tax. It can, nevertheless, be distributed as dividend among the shareholders, or spent in purchasing stock or machinery, or in any other way which the company thinks fit. However, the company may equally well utilise its power of realising the premium by purchasing, say, stock in trade, or by discharging a liability, without any cash passing through D its hands at all. If a company, for example, the £1 shares of which stand at 10 per cent. premium in the market, buys goods of the value of £110 by the issue of 100 fully paid shares to the vendor, the cost price of the goods to the company is £110. If it then sells the goods for £130, its trading profit from the transaction (apart from working charges E which can be disregarded) will be £20, and not £30. It will have made a total profit on the transaction of £30, but £10 of this, representing the premium, will be entered as a receipt on capital account. The £20 alone will be taxable.

A company, too, in the like circumstances, may discharge an existing F trading liability of £100 by the issue to its creditor of 1,000 shares for a payment of £1,000. It will not have parted with the £100, but it will have utilised the power of realising the £100 premium by preventing its assets from being depleted by that amount. The £100 will, accordingly, be deducted from the trading account, *pro tanto* diminishing the G taxable trading profit, and a similar amount must be credited in the books as a receipt on capital account. It is to be observed in both these cases that, if the premium could be treated as a trading and taxable receipt, there would be no necessity to resort to this method of bookkeeping. In the first instance, the cost of the goods could be entered H as being £100 only, and, in the second instance, nothing would be deducted in respect of the debt, and nothing in either case would be credited in respect of the premium. It is the fact that the premium is not a trading and taxable receipt that renders this " short circuiting " impossible.

Applying these considerations to the present case, it is obvious that the directors have utilised the possession of the power of realising a premium of £1 18*s*. 9*d*. on each of the 6,000 shares for the purpose of inducing their employees to subscribe at par for those shares, and so becoming members of the company. It is found that this was done
A solely in the interests of the company's trade, which means that it was done solely for the purpose of enabling the company to earn its income. In these circumstances, but for the fact that some of your Lordships are of the contrary opinion, I should have thought it plain that, in ascertaining the trading profits of the company on commercial principles,
B the deduction now sought to be made was permissible as part of the cost of earning the company's income, a like sum being, of course, credited to its capital account.

It may be convenient at this stage to say something about a passage in the judgment of SIR WILFRID GREENE, M.R., in the present case
C which has been the subject of much misunderstanding. The passage in question is as follows ([1939] 1 All E.R., at p. 358):

> If an employer having two receptacles, one containing cash and the other containing goods, chooses to remunerate his employee by giving him goods out of the goods receptacle, instead of cash out of the cash receptacle, the expenditure that he makes is the value of those goods, not their purchase price—and not anything
> D else but their value—and that is the amount which he is entitled to deduct for income tax purposes.

It seems to have been thought that SIR WILFRID GREENE, M.R., was here suggesting that, for the purpose of ascertaining the profits of the employer's business made by the purchase and sale of such goods, the
E cost of the goods to the employer was to be treated as their sale value. SIR WILFRID GREENE, M.R., of course, said nothing so absurd. If an employer, having bought 100 tons of coal at 20*s*. per ton, and having incurred no expense other than £10 10*s*. paid in cash to his clerk for salary, sells the coal for 30*s*. per ton, the profit of his trade is £39 10*s*.
F If, however, instead of paying the clerk in cash, he pays him by handing over to him 7 tons of coal worth 30*s*. per ton, and sells the remaining 93 tons at 30*s*. per ton, the result to the trader will obviously be the same as in the first case, but the amount that he will enter in his accounts in respect of the salary of his clerk will depend upon the way in which
G he chooses to keep his books. He may, if he likes, treat the 7 tons as having been sold to the clerk at 30*s*. per ton. In that case, he will deduct £10 10*s*., the value of the 7 tons, as an expense in respect of the clerk's salary. In this case, however, the sum which would have been realised, had the 7 tons been sold at 30*s*., would have to be treated as a trading
H receipt. The employer could, therefore, and no doubt would, short circuit the account by crediting himself with nothing in respect of the 7 tons and debiting nothing in respect of the salary. I have taken this example, as it was one that the Solicitor-General placed before your Lordships for the purpose of showing that, in such a case as last supposed, no deduction could be made in respect of the clerk's salary. The

Solicitor-General, however, was assuming that the employer short circuited the account. No further deduction could be made in that case in respect of the salary, for it would have already been deducted in account. Sir Wilfrid Greene, M.R., on the other hand, was obviously assuming that the employer used the longer, and perhaps more accurate, way of keeping his accounts. In that case, the value of the 7 tons of coal would properly be deducted as an expense, for the employer would have credited himself with that value as a trade receipt. Sir Wilfrid Greene, M.R., no doubt thought it was unnecessary to say so, and so it was.

Having arrived at the conclusion that the deductions in the present case would on commercial principles be permissible as part of the cost of earning the company's income, I must now inquire whether such a deduction is expressly prohibited by the Income Tax Act and rules. I can deal with this matter quite shortly. The only rule which by any possibility can be regarded as prohibiting the deduction is Sched. D, Cases I and II, r. 3 (*a*). However, if the sum now in question is to be regarded as a disbursement or expense at all, it can only be done by treating the company by a stretch of the imagination as having received the sum and passed it on to the employees. In that case, however, the sum must be treated as money, and, as it would have been wholly and exclusively laid out or expended for the purposes of the trade, the deduction is not prohibited. I should, therefore, have arrived at the conclusion that the deduction in question is permissible even if there were no authority to be found in the books to lend support to that conclusion. There are, however, at least two decisions of your Lordships' House which appear to me to be direct authorities in favour of the view which I have endeavoured to express. They are *Russell* v. *Town & County Bank* (4) and *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (2). The facts in the first of these two cases, decided under the Income Tax Act, 1842, were these. A company carrying on the business of banking were the owners of the premises upon which the business was carried on, and those premises contained certain accommodation occupied as a dwelling-house by the manager of the bank. The company claimed to deduct, in estimating the balance of their profits and gains under Sched. D, the entire annual value of the bank premises, including the portion so occupied by the manager. The Crown, on the other hand, contended that the portion of the premises occupied for that purpose ought to be dealt with separately from the part used for the actual carrying on of the business, and that no deduction ought to be allowed in respect of the annual value of the portion occupied by the manager as a dwelling-house. The point at issue, therefore, was, in effect, whether the deduction of this last-mentioned annual value was not forbidden by what at that time corresponded to the present r. 3 (*c*), it being admitted by the Crown that the annual value—namely, the rent which the company might have received for the bank premises proper, had they let the premises to a tenant—

was a proper deduction. This admission was held by LORD HERSCHELL to have been rightly made. He said, at p. 425:

> Now it is not disputed that the annual value of the premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains. I am, of course, speaking, for the moment, of premises which are not used in any way as a place of dwelling, but are exclusively business premises. But there may be a question where the right to make that deduction is to be found. I am myself disposed to think that it is allowed because it is an essential element to be taken into account in ascertaining the amount of the balance of profits. If not it can only be included by a very broad extension of the terms actually used, as being a disbursement or expense which is money wholly and exclusively laid out or expended for the purposes of the trade.

He then referred to the exception contained in the predecessor of r. 3 (*c*) (which was substantially the same as the exception contained in r. 3 (*c*)), but, as I read his judgment, merely as being confirmatory of the conclusion he had reached without that exception. If he had thought that the exception was itself an enactment impliedly justifying the deduction, he would have said so, and would not have given other reasons for arriving at his conclusion, which seems to be based on quite general principles. The annual value of the part occupied by the manager was also allowed as a deduction, it being held that the part so occupied was not a dwelling-house within the rule. LORD FITZGERALD also based his decision on general principles relating to the ascertainment of profits, and made no reference at all to the rule relating to dwelling-houses. He said, at p. 429:

> "Profits" I read on authority to be the whole of the incomings of a concern after deducting the whole of the expenses of earning them—that is what is gained by the trade. The whole expenses of earning them must mean, according to the schedule, the whole expenses incurred for the purposes of the business and nothing else. But I come, upon the statement of facts, to the conclusion that . . . the whole premises were used for the purposes of the business of the bank and the annual value of them forms a proper deduction in estimating the balance of profits. . . . That balance of profits is to be ascertained after deducting the whole of the necessary expenses save those which by negative provisions are excepted in the statute.

LORD MACNAGHTEN said, at p. 430, that the deduction was "properly and necessarily made in estimating the profits and gains of the bank which were chargeable to duty," and that there was nothing in the rules applicable to Sched. D, Cases I and II, prohibiting the deduction. He did not think that the house was a dwelling-house within the meaning of the rules. I would call attention to the word "necessarily" used by LORD MACNAGHTEN.

I regard this case as a clear authority for the proposition that, in computing the profits of a trade for income tax purposes, a sum may be deducted as part of the cost of earning the receipts which has never in fact been paid or expended, but is something the receipt of which has been forgone for the purpose of the trade. In the particular case, the company refrained from letting their premises, and so earning a profit, solely in the interests of their business. It was, therefore, proper and necessary, on ordinary commercial principles, to deduct from their receipts this profit which they might have made as part of the cost of earning such receipts, and there was nothing in the Act to render such deduction illegal.

My Lords, *Usher's* case (2), as I read it, is another authority for the same proposition. The facts of that case are so familiar to your Lordships that I will not weary you with reciting them. It is sufficient to recall that the brewery company sought to deduct (amongst other things) the difference between the annual value in the case of freehold and the rent they paid in respect of leasehold houses, on the one hand, and the rent received from their tied tenants, on the other. Your Lordships are also familiar with the reasons given by this House for deciding that the actual cash disbursements made by the company in connection with the tied houses were allowable deductions upon ordinary commercial principles, and not prohibited by the Income Tax Acts then in force. However, the important thing to be noticed for the present purpose is that none of their Lordships who were parties to the decision drew any distinction between the freehold and leasehold properties—that is to say, between the rents paid for the leaseholds and the annual values of the freeholds. Both the annual values in the case of the freeholds and the rents paid in the case of the leaseholds were treated as forming part of the cost of the brewery business, and for precisely the same reason—namely, that both the rents paid for the leasehold properties and the rents which would have been received for the freeholds had they been let, instead of being used for the business, formed part of the costs incurred in earning the receipts of the business, and that the deduction of them was not prohibited by the Act. Earl Loreburn, referring to both classes of property together, said, at p. 446:

> On ordinary principles of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay.

In the same case, Lord Atkinson, in holding that it was immaterial whether a manager or a tied tenant was put into occupation of the houses, said, at p. 457:

> Part of the costs to the brewer is, in the manager's case, his salary, and possibly a discount on profits. In the case of the tenant it is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it, and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under Sched. A. For the purposes of striking the balance of profits and gains the two cases are in principle undistinguishable.

Also in the same case, Lord Parker said, at p. 463:

> The appellants claim to deduct, in the one case, the difference between the Sched. A assessment and the rent they receive, and in the other case the difference between the rent they pay and the rent they receive. In other words, they claim the Sched. A assessment value or the rent they pay as a deduction, giving credit on the other side of the account for the rent paid by the tenants of the tied houses. I am of opinion that they are also right in this contention.

In the same case, Lord Sumner dealt even more particularly with this absence of difference, for the purpose of estimating the costs of a business, between sums actually spent and sums which might have been received, but were forgone for the purposes of the business. He said, at p. 469:

> Next as to the rent. A trader who utilises, for the purposes of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade. Equally he does so if he hires or rents for that purpose property belonging A to another.

These observations exactly apply to the present case if, as I have endeavoured to show in an earlier part of this opinion, there can be no difference in principle between utilising property and utilising a power for the purposes of a business.

B It is plain from the passage which I have just cited from the opinion of LORD SUMNER that, in deciding in favour of the deduction of the annual values of the freeholds, he was not relying in the least upon any consideration peculiar to land or houses, or upon any implication which was to be drawn from the rule now represented by r. 3 (*c*), C and nor did the other noble Lords. It appears, moreover, that neither LORD ATKINSON nor LORD PARKER, who were the only ones who referred to *Russell's* case (4), regarded that case as depending upon any such consideration. LORD ATKINSON said that the decision in that case was obviously right and just, because, if the trader abstains D from letting his premises, and devotes them to the purposes of his trade, he must be taken to have dedicated to that trade a sum equivalent to the annual sum which he might have obtained in the shape of rent if he had let them to an untied tenant. LORD PARKER enumerated three points which he said had been decided in *Russell's* case (4). Of these, E I need only mention the second, because that one alone dealt with the prohibition of deductions in respect of the annual value on rent of dwelling-houses. He said, at p. 460:

> Secondly, it decides that the rule refers only to a dwelling-house or domestic offices, or part of a dwellinghouse or domestic offices, occupied by the person to F be assessed; so that the fact that a bank manager resides in part of the bank premises does not bring that part of the premises within the prohibition or prevent the whole premises from being considered as used for the purposes of the trade. In other words, the effect of the prohibition cannot be extended by implication to cover a deduction for rent or annual value which would otherwise be a proper deduction in ascertaining the balance of profits and gains.

G It is not that the rule permits the deduction by implication of the annual value or rent of a house which is not a dwelling-house. The point is that the rule does not prohibit that deduction, which is a proper one to be made on commercial principles. My Lords, for these reasons, I would dismiss this appeal.

H *Appeal allowed.*

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Freshfields, Leese & Munns* (for the respondent company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

WELD BLUNDELL AND OTHERS *v.* SYNOTT.

[King's Bench Division (Asquith, J.), **April 3, 29, 1940.]**

Mistake—Money paid under mistake of fact—First mortgagee selling mortgaged property and remitting incorrect balance to second mortgagee—Mistake in calculation of interest—Mistake inter partes—Estoppel.

Mortgage—Sale—Application of proceeds—Duty of first mortgagee to subsequent encumbrancers.

The plaintiffs and the defendant were respectively first and second mortgagees of a property. The mortgagor having defaulted, the plaintiffs exercised their power of sale, and the proceeds available for the defendant, after deduction of the amounts for principal and interest due to the plaintiffs, amounted to £301 5*s.* 1*d.* Owing to a miscalculation by the plaintiffs of the amount of interest due to them, the defendant was credited with, and was paid, £413 15*s.* 1*d.* The plaintiffs sought in this action to recover the amount so overpaid—namely, £112 10*s.*—as money paid under a mistake of fact. The defendant contended, first, that the mistake was one between the mortgagor and the plaintiffs, not between the plaintiffs and the defendant, and was, therefore, not such a mistake as would make the money recoverable, and, secondly, that the plaintiffs had made a representation of fact to the defendant on which he had acted to his detriment, in that he had increased his overdraft with his bank to meet his obligation under the second mortgage to guarantee the mortgagor's overdraft, and that the plaintiffs were estopped from demanding repayment:—

Held: (i) the defence that the mistake was not *inter partes* failed, and there was, therefore, a mistake of fact *prima facie* entitling the plaintiffs to recover.

(ii) even assuming that there had been a representation upon which the defendant had acted to his detriment, no question of estoppel arose as there was no neglect or misconduct on the plaintiffs' part in making the representation. A first mortgagee is not under any duty to inform a second mortgagee of the true state of the account between himself and the mortgagor.

[EDITORIAL NOTE. The question of the recovery of money paid under a mistake of fact has been considered in a number of cases, but not in a previous case with reference to the payment of the surplus proceeds of sale made by a first mortgagee to a second mortgagee. The position might have been thought to be complicated by the fact that a first mortgagee is, in such circumstances, a trustee for all subsequent incumbrancers, but, now that the matter has been considered, this does not seem to affect the ultimate result.

As to Surplus Proceeds of Sale in Hands of Mortgagee, see HALSBURY, Hailsham Edn., Vol. 23, pp. 443, 444, para. 653; and for Cases, see DIGEST, Vol. 35, pp. 513-517, Nos. 2434-2468.]

Cases referred to:

(1) *Kelly* v. *Solari* (1841), 9 M. & W. 54; 35 Digest 151, *487*; 11 L.J.Ex. 10.

(2) *Chambers* v. *Miller* (1862), 13 C.B.N.S. 125; 35 Digest 148, *467*; 32 L.J.C.P. 30; 7 L.T. 856.

(3) *Aiken* v. *Short* (1856), 1 H. & N. 210; 35 Digest 148, *461*; 25 L.J.Ex. 321; 27 L.T.O.S. 188.

(4) *Deutsche Bank (London Agency)* v. *Beriro & Co.* (1895), 73 L.T. 669; 21 Digest 313, *1154*.

(5) *Jones (R. E.), Ltd.* v. *Waring & Gillow, Ltd.*, [1926] A.C. 670; 35 Digest 149, *470*; 95 L.J.K.B. 913; 135 L.T. 548.

(6) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281; 35 Digest 157, *537*.

(7) *Holt* v. *Markham*, [1923] 1 K.B. 504; 35 Digest 157, *533*; 92 L.J.K.B. 406; 128 L.T. 719.

(8) *Standish* v. *Ross* (1849), 3 Exch. 527; 35 Digest 158, *541*; 19 L.J.Ex. 185; 12 L.T.O.S. 495.

ACTION for the recovery of money paid under a mistake of fact. The A facts are fully set out in the judgment.

W. H. Moresby for the plaintiffs.

F. Hallis for the defendant.

ASQUITH, J.: This is a claim to recover money paid under a B mistake of fact. Very few of the facts are in dispute. The plaintiffs were at all material times first mortgagees of certain property of which the defendant was the second mortgagee. The mortgagor having defaulted, the plaintiffs exercised their power of sale. The proceeds of sale amounted to £6,595 2*s.* 8*d.* net. The plaintiffs claimed (and their C claim was conceded at the hearing) that they were entitled, as first mortgagees, to retain out of this fund what was due to them—namely, £6,000 as principal and £293 17*s.* 7*d.* as interest. That is £6,293 17*s.* 7*d.* in all. They were, therefore, bound to account to the defendant, to whom, as second mortgagee, £500 plus interest was due, for the balance—namely, D £301 5*s.* 1*d.* By mistake, the plaintiffs presented to the defendant an account showing £413 15*s.* 1*d.* as due to him, and later, on Dec. 1, they paid him that sum. That was because, through a miscalculation on the part of an accountant, the plaintiffs had retained for themselves, under the head of "Interest," not the full £293 17*s.* 7*d.* to which they were E entitled, but only £181 7*s.* 7*d.* They have, therefore, overpaid the defendant the difference between those two sums—namely, £112 10*s.*—and in this action they seek to recover this excess as money paid under a mistake of fact.

The defendant disputed on the pleadings, but conceded at the hearing, F that the plaintiffs were entitled to £6,000 principal and £293 17*s.* 7*d.* interest on their mortgage. He does not admit that any part of this sum was paid to him under such a mistake of fact as would entitle the plaintiffs to repayment. Alternatively, he contends that, if the mistake—for mistake of one sort or another there unquestionably G was—was of the character which justified the claim for repayment, the plaintiffs are estopped from claiming the return of the amount overpaid. He says that the plaintiffs misled him into the belief that the larger sum was due to him, and that in various ways he was induced by their misrepresentation to alter his position.

H The events leading up to this litigation are as follows. In Dec., 1934, the plaintiffs lent to a Mrs. Gouldman £6,000 at 5 per cent. interest on a first mortgage of freehold property belonging to her. Later, the defendant lent Mrs. Gouldman £500 on a second mortgage of the same property. The defendant had guaranteed her overdraft with the Midland Bank up to £500 and took his second charge on her property as security for this liability. Mrs. Gouldman defaulted as against the plaintiffs, who got a receiver appointed. Later, on June 24, 1938, the plaintiffs caused the mortgaged property to be sold. On July 21, the plaintiffs, by their solicitors, forwarded to the defendant's solicitor a statement purporting to show how the purchase money had been dealt with and the balance remaining. This statement had been compiled by an accountant employed by the plaintiffs, or by the receiver whom the plaintiffs had put in. It showed the gross proceeds of sale as £7,004 14*s*. 10*d*., the principal due to the plaintiffs as first mortgagees as £6,000, and the interest due to the plaintiffs as £181 7*s*. 7*d*. Deducting these items plus the charges of the receiver, auctioneer and solicitors, the statement showed a balance of £420 19*s*. 3*d*. as the balance to be handed over to the defendant as second mortgagee, less certain legal charges not then ascertained.

The figure of £181 7*s*. 7*d*. for interest due to the plaintiffs was in fact wrong, the accountant's assistant having failed to include in the interest defaulted on an instalment of interest due on June 7, 1937, which amounted (minus tax) to £112 10*s*. The balance shown on the statement as payable to the defendant should, therefore, have been £112 10*s*. less than it appeared to be on the face of the statement.

Certain correspondence followed in September and October between the plaintiffs' solicitors and the defendant, in the course of which the former, for no reason I can follow, practically declined payment of the balance due to the defendant until the defendant had paid off Mrs. Gouldman's overdraft with the Midland Bank in accordance with his guarantee. On Nov. 10, the bank informed the plaintiffs' solicitors that this had been done. The defendant, who had earlier paid the bank £100, paid a further sum of £416 12*s*. 9*d*., and the guarantee was cancelled. To pay this further sum, the defendant had to raise or increase his overdraft with his own bank, Lloyds Bank, by that amount. What concern it was of the plaintiffs whether the defendant had done this is a matter on which nobody could throw any light. The bank had not pressed the defendant for payment on his guarantee. On Nov. 30, the plaintiffs' solicitors sent a statement showing the final balance due to the defendant—namely, the sum of £420 19*s*. 3*d*. previously mentioned, less £7 4*s*. 2*d*., the figure at which the legal costs to be deducted had been ascertained. The final balance was, therefore, shown at £413 15*s*. 1*d*., and on Dec. 1, the defendant signed a receipt for this sum.

By Dec. 12, the plaintiffs had discovered the accountant's error of £112 10*s*., and wrote demanding repayment of this amount as overpaid. On Jan. 6, 1939, the defendant's solicitors, on his behalf, refused this demand, pointing out, *inter alia*, that the defendant, in reliance on the plaintiffs' assurance that £420-odd, less legal costs, was due and was coming to him, had borrowed £416-odd from his bankers, and had paid off Mrs. Gouldman's overdraft with the Midland Bank in accordance with his guarantee, and that he had done so at the plaintiffs' solicitors' request, or, rather, because of their insistence. On Feb. 3, the plaintiffs issued the writ claiming repayment of £112 10*s.* as paid under a mistake of fact. Those, I think, are all the relevant facts, and none of them is in dispute.

The defendant, as I have indicated, sets up two pleas—namely, (i) that
A the money, though paid by mistake, was not paid under such a mistake of fact as to be recoverable, or alternatively (ii) that, since the plaintiffs had misled the defendant into the belief that the sum paid, and no less, was due to him, and he had altered his position on the faith of that representation, they were estopped from demanding repayment. I will deal
B with these defences in turn. As to the first, the defendant's main contention was that the mistake was a mistake, not as between the plaintiffs and the defendant, but as between the plaintiffs as first mortgagees and the mortgagor, because it concerned the amount due to the plaintiffs from the mortgagor as interest, and he contended that this
C was a mistake with which the defendant had nothing to do. Against *Kelly* v. *Solari* (1) and similar cases, the defendant relied on authorities such as *Chambers* v. *Miller* (2), *Aiken* v. *Short* (3) and *Deutsche Bank (London Agency)* v. *Beriro & Co.* (4). He relied on these cases as deciding that, if money is to be recoverable as paid under a mistake of fact, the
D mistake must have been one as between the plaintiff and the defendant, between the payer and the payee. I have found some difficulty in apprehending the exact meaning of the words "as between" in this connection. It is notoriously difficult to reconcile all the cases dealing with payment of money under a mistake of fact, but the ground on which
E it was said in *Chambers* v. *Miller* (2) that the mistake was not one between the parties was that it did not affect the liability as between the payer and the payee. That is to say, it was not such a mistake that, if the mistaken assumption of the payer had been true, there would have been a legal right in the payee to demand, and a legal obligation in the payer to pay, the
F money in question. More concretely, if the bank's customer in that case had had in his account assets sufficient to meet the cheque, as the bank wrongly supposed that he had at the time when it paid, there would still have been no legal right in the payee to demand payment from the bank, whereas in *Kelly* v. *Solari* (1) (where the mistake was presumably
G held to be a mistake between the payer and the payee, since otherwise the plaintiff could not have recovered) the mistake was one which did affect liability as between them. If the life policy of the deceased man had still been valid, as the payer mistakenly imagined, he would have been bound to pay the insurance moneys to the executrix of the
H deceased man. In *Aiken* v. *Short* (3), the plaintiff failed to recover the money back, and here again, although the court did not refer under that name to the distinction between mistakes which are between the parties and mistakes which are not, BRAMWELL, B., in his judgment seems to have had this distinction in mind when he says that, to render the money recoverable, the mistake must be as to a fact which, if true,

would have made it obligatory on the payer to pay the payee, and that it is not enough if it is merely a mistake as to a fact which, if true, would make it desirable for the payer to make the payment.

When a mistake is one affecting obligation, I think that it is between the parties. It is perhaps not easy at first sight to square this conclusion with such cases as *Deutsche Bank* (*London Agency*) v. *Beriro &* A
Co. (4), but, as LORD SUMNER says in *Jones* (*R. E.*), *Ltd.* v. *Waring & Gillow, Ltd.* (5), that case was decided on the basis of a contractual duty owed by the payer to the payee. Whether there is a comparable duty in the present case I will consider in a moment when dealing with estoppel. Apart from that, there is much in the opinion of LORD B
SUMNER in that case to support the view which I have expressed as to the meaning of a mistake between the parties. For instance, he says, at pp. 691, 692:

> They [R. E. Jones, Ltd.] issued it [the cheque for £5,000], to discharge their obligation, and there being no obligation in fact, the money was paid to Waring & C
> Gillow, Ltd., under a mistake of fact, a mistake arising directly between these two companies.

The only basis on which it has been argued that, in the present case, the mistake is not of this character is that it was, or arose from, a mistake as to what the mortgagor owed the plaintiffs, and, therefore, was a mistake D
between the morgagor and the plaintiffs, and not between the plaintiffs and the defendant. I cannot see why it should not be both. Where what A owes to B depends on what A is owed by C, and A, owing to a mistake as to the latter amount, automatically also makes a mistake as to the former amount, there is a mistake, in my view, not only as E
between A and C, but also as between A and B. I therefore hold that the defence that the mistake was not *inter partes* fails.

I now come to the second defence, estoppel. Assuming there is, as I have held, a mistake of fact entitling the plaintiffs *prima facie* to recover, are they estopped from recovering? It is argued for the defendant that F
there was here a representation of fact by the plaintiffs acted on by the defendant to his detriment. The account showing £420 19*s.* 3*d.*, minus a certain unascertained deduction for costs, is relied on as a representation, and the act of the defendant in paying off the mortgagor's overdraft by raising or increasing an overdraft of his own is relied on G
as an act done to his detriment in reliance on this representation. Then again it is said that there was a second representation, consisting in the actual payment over on Dec. 1 of £413 15*s.* 1*d.* to the defendant, a representation that that amount and no less, was due. I am not sure what act, following this second representation, was relied on as an alteration H
of the defendant's position, but I think that his omission to sue the mortgagor on her personal covenant between Dec. 1 and Dec. 12, when the defendant was undeceived, was mentioned in this connection.

As to the first representation, I do not think that it was definite or unequivocal. The representation "I owe you £420 less a deduction of

an unknown amount" is very vague, nor is it clear that, by paying off the sum he had guaranteed, which he would have to pay off sooner or later, the defendant was incurring any net detriment. He may have paid earlier than he would otherwise have paid, but, as against that, he would save interest. As to the second representation, it is not estab-
A lished that, but for it, the defendant would have sued the mortgagor between Dec. 1 and Dec. 12, or that, if he had, he would have reaped any benefit by doing so then, or, again, that he could not have done so thereafter if there was anything to be gained by such an action. I will consider the position, however, on the assumption that I am wrong on
B both these points. Assuming that, contrary to my view, there was a sufficient representation, and a sufficient acting on it to the representee's detriment, even on that assumption I do not think that an estoppel arises unless it can be shown that there was neglect or misconduct on the plaintiffs' part in making the misrepresentation.

C When the decisions as to estoppel in connection with payment of money under a mistake of fact are closely examined, much seems to turn on whether the payer was subject to a duty as against the payee to inform him of the true state of the account, which is in effect a duty not to make a mistake of fact in that regard. In *Skyring* v. *Greenwood* (6), an
D Army paymaster, the plaintiff, was held to owe a major in the Army, the defendant, such a duty. He misinformed, and overpaid the defendant. The defendant was held entitled to assume that the plaintiff had performed his duty, and, having himself spent the money overpaid, on this assumption, he was held not liable to refund it to the plaintiff.
E So, again, in *Holt* v. *Markham* (7), a very similar case, the Court of Appeal by a majority decided that the mistake was one of law. SCRUTTON, L.J., did not commit himself on this issue, but all three Lords Justices agreed that, if it was a mistake of fact, yet the plaintiff was estopped. The payer there was under a duty to the payee almost
F exactly similar to that in *Skyring* v. *Greenwood* (6). In *Deutsche Bank (London Agency)* v. *Beriro & Co.* (4), the payer was under a contractual duty.

In *Standish* v. *Ross* (8), a case in which there was no breach of duty or misconduct by the payer, the court held that, where money is
G paid over under an ordinary mistake of fact, it could not be any bar to its recovery [p. 534]:

> . . . that the defendant had applied the money in the meantime to some purchase which he otherwise would not have made, and so could not be placed *in statu quo*.

In the present case, is there any such duty upon the payer as to raise
H an estoppel? Undoubtedly a first mortgagee who sells the mortgaged property and collects the full proceeds is under some duty to incumbrancers who rank after him. That duty is to hold the balance of the proceeds, after satisfying his own debt, in trust for those incumbrancers. However, I do not think that the law places upon him an additional duty, comparable to that of the Army paymasters in the two cases I have cited,

at his peril to inform the second mortgagee correctly of the true state of the account. The duty under this head does not, in my view, exceed that of an ordinary trustee, who would, I think, not be estopped in similar circumstances. It is true—and I have not overlooked the argument—that in this case the accounts as between the first mortgagee and the mortgagor were exclusively within the knowledge of the first mortgagee, as between him and the defendant, but so they may equally be in the case of an ordinary trustee. One can easily imagine a case in which exclusive knowledge, or means of knowledge, of the amount due to the *cestui que trust* resided in the trustee. In that case, there would not, I think, be an estoppel; nor, by parity of reasoning, should there be in this. The result is that there must be judgment for the plaintiff for £112 10*s.* with costs.

Judgment for the plaintiff for £112 10*s. with costs.*

Solicitors: *Church, Rendell, Bird & Co.*, agents for *Taylor, Kirkman & Mainprice*, Manchester (for the plaintiffs); *Barfield, Child, Barry, Lucas & Sons* (for the defendant).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

MILLS *v.* STANWAY COACHES, LTD., AND ANOTHER.

[Court of Appeal (Slesser, Clauson and Goddard, L.JJ.), **May 9, 1940.**]

Negligence—Damages—Personal injuries—Loss of expectation of life—Married woman aged 34 *years—Amount of assessment—Damages for pain and suffering—Deceased unconscious most of time between accident and death.*

The plaintiff sued as the administrator of the estate of his wife, who had been fatally injured in a motor accident. The court of first instance awarded £2,000 damages in respect of the loss of expectation of life and £200 damages in respect of pain and suffering. At the time of the accident, the wife was 34 years of age, and in good health. Her husband was the manager of a provision shop. The wife survived the accident for 4 days only, and for most of that time she was unconscious:—

Held: (i) the damages awarded for loss of expectation of life were, in the circumstances, excessive, and ought to be reduced to £1,000.

(ii) the damages awarded for pain and suffering were also excessive, and ought to be reduced to £50.

[**EDITORIAL NOTE.** Goddard, L.J., adapting certain well-known words, here states that damages awarded for loss of expectation of life have increased, are increasing, and ought to be diminished. The Court of Appeal, being unanimous in this view, have here sought to set some limit to the amount of such damages, but they content themselves with making the suggestion that the amount of such damages should be moderate, and that £1,000 should be regarded as a maximum in the case of adults. The assessment, apparently, must still remain empirical, and no scale has been suggested here. In fact, the decision is rather against the suggestion of any scale, for the award in the case of a married woman, 34 years of age, who had given birth to 4 children, has been made the same as that in the case of an unmarried woman of 23 years of age. It is clear that the judgment appealed against, which awarded twice as much to the married woman as to the single one, was wrong, but it is only little less difficult to support the award of the same amount in the two cases.

As to Damages for Personal Injuries, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016; and for Cases, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to:

(1) *Flint* v. *Lovell*, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231.

(2) *The Aizkarai Mendi*, [1938] P. 263; [1938] 3 All E.R. 483; Digest Supp.; 107 L.J.P. 141; 159 L.T. 490.

(3) *Gambling* v. *Benham*, [1940] 1 All E.R. 275; Digest Supp.

(4) *Rose* v. *Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174; *on appeal from* [1936] 1 K.B. 90.

(5) *Armsworth* v. *South-Eastern Ry. Co.* (1847), 11 Jur. 758; 36 Digest 140, *941*.

(6) *Rowley* v. *London & North Western Ry. Co.* (1873), L.R. 8 Exch. 221; 36 Digest 140, *942*; 42 L.J.Ex. 153; 29 L.T. 180.

(7) *Bailey* v. *Howard*, [1939] 1 K.B. 453; [1938] 4 All E.R. 827; Digest Supp.; 108 L.J.K.B. 182; 160 L.T. 87.

(8) *Reid* v. *Lanarkshire Traction Co.*, [1934] S.C. 79.

Appeal by the first defendants from a judgment of Greaves-Lord, J., without a jury, dated Feb. 6, 1940. The facts are fully set out in the judgment of Slesser, L.J.

John W. Morris, K.C., and *S. R. Edgedale* for the appellants.

N. R. Fox-Andrews for the first respondent.

J. P. Eddy, K.C., and *F. G. Paterson* for the second respondent.

Slesser, L.J.: The plaintiff, Ernest Mills, sued primarily as the administrator of the estate of his wife, Milly Mills, deceased. The judge has come to the conclusion that the wife, who was travelling as a passenger in a car which was being driven by one Joseph Martin, who was one of the defendants, was killed through the negligence of the driver of the car of the other defendants, Stanway Coaches, Ltd. He has acquitted Joseph Martin of negligence, and has given £2,000 damages against Stanway Coaches, Ltd., in respect of the loss of expectation of life of Milly Mills, and £200 damages in respect of pain and suffering incurred by her for the 4 days between the accident and her death, during nearly the whole of which time she was in a state of unconsciousness in hospital. There is also an award of a small sum under the Fatal Accidents Act in respect of funeral expenses which, by the provision of the Law Reform (Miscellaneous Provisions) Act, 1934, may now be regarded as vested in the estate so as to enable the administrator to claim for it. There is no contest with regard to this small sum of £28 10*s*. for funeral expenses.

It is said, in the first place, as against the plaintiff, that the judge was wrong in awarding the sum of £2,000 for loss of expectation of life and the sum of £200 for pain and suffering incurred by the deceased, now vested in the estate, as I have said, in that, to quote the well-known language of Greer, L.J., in *Flint* v. *Lovell* (1), at p. 360:

> . . . the amount awarded was so extremely high . . . as to make it, in the judgment of

this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

In the first place, it is convenient to deal with the larger sum, the sum of £2,000, which has been awarded for the loss of expectation of life of Milly Mills. On that, of course, two matters have to be determined—namely, (i) the question whether or not the sum is so excessive an amount that this court will say that the judge was wrong in awarding it, and (ii) if the court be of opinion that he was so mistaken, what sum ought properly to be assessed in its place. Two questions have always to be borne in mind in dealing with this matter. First, is it a case where the court ought to interfere with the discretion of the judge, who, sitting without a jury, if he assesses the damages without offending against any principle, or without giving damages so excessively high or so excessively low that this court ought properly to interfere, must be the arbiter of the amount of the damages? This court will not interfere with the discretion or decision of a judge on the amount of damages merely because this court, or any member of it, would be inclined to give a different figure. That has been so often stated that it is scarcely necessary to repeat it again, but I mention it as introducing what, I think, are the considerations which should move the court in applying the principle to this case. The other question which I think has to be considered is how far the fact that this court, in dealing with the assessment of damages in similar cases, has approved or disapproved the assessment appealed against, or itself assessed particular damages, should be used as a guide to this court in determining whether or not the particular damages awarded in any particular case should be disturbed. In my view, such matters may be a guidance, but are not a mechanical guidance. That is to say, the mere fact that in a particular case this court has allowed a certain sum to be varied and some other sum to be assessed on the ground that it is excessively high or excessively low is some assistance to this court, if the facts otherwise are similar, in dealing with the matter, but is not to be taken as a rigid determination or limit of the amount of damages which ought to be awarded. I say that for the reason that, were this court to apply rigidly the principle that what it has once given in similar circumstances should be given again, it would invade the province of the judge, whose province to award damages is such that it will not be invaded merely because this court would give a different sum. On the other hand, as I say, it is some criterion, and in some cases may be of material assistance.

In the present case, this woman who was awarded the sum of £2,000 (or, rather, her husband, as administrator of the estate, received that sum as now vested in him, though notionally at the time of her death in her) was a woman of 34 years of age. She had four children. She had never had an illness in her life, and the judge tells us—I suppose on sufficient material, though it is only one of the elements to be considered—that her expectation of life in those circumstances, according to the actuarial estimates, would be another 34 years. He says that that is so according to the Expectation of Life Table, and he says he will assume that she was at the happiest part of her life. Her situation in life is that of a respectable class, not overburdened with riches and not overpressed by poverty. Her husband is a provision shop manager. She belonged to what used to be called, I suppose, that very useful part of the community, the lower middle class. That is her position, and there is very little more that can be said about her.

It has been held by LANGTON, J., in *The Aizkarai Mendi* (2) that in any question of expectation of life the age factor cannot be entirely negligible, and [p. 277]:

> . . . if one assumes that the pleasure in existence derived by two men of different ages is equal, it appears to me to follow that, if both are in the same state of health and are following the same calling with the samé kind of risk, the expectation of life of the younger man must exceed that of his elder.

The court, by a majority, approved that approach to the matter in *Gambling* v. *Benham* (3). That being so, one has regard to the fact—as I have said, as a mere assistance of one's ultimate judgment and not as a mere mechanical conclusion—that this court, in *Rose* v. *Ford* (4), dealing with the case of a woman younger than the deceased woman in the present case was itself called upon to assess the damages. The reason was that in the court below in that case HUMPHREYS, J., had thought that the decision in *Flint* v. *Lovell* (1), which was the earliest case which immediately raised this question, dealt with the loss of expectation of life as a part of mental suffering. The report says ([1936] 1 K.B., at p. 92):

> He [HUMPHREYS, J.] rejected the third ground of claim for damage for loss of a reasonable expectation of life, because there was no evidence at all of any mental suffering being caused to the girl by reason of the shortening of her expectation of life, which he thought was the basis of the decision in *Flint* v. *Lovell* (1).

This court took the view that he was wrong, and that *Flint* v. *Lovell* (1) had decided that, quite apart from any question of pain and suffering, the person whose life had been shortened in expectation, while living, as in *Flint* v. *Lovell* (1)—or now, by operation of statute, the administrator of the estate—might claim damages for that matter as an independent head of damage. Consequently, this court in *Rose* v. *Ford* (4)—and the House of Lords afterwards decided that it was correctly decided, and that *Flint* v. *Lovell* (1) was itself good law—had to assess the damages, and an award of £1,000 was made by this court. GREER, L.J., at p. 102, quotes from what had been said by PARKE, B., in *Armsworth* v. *South-Eastern Ry. Co.* (5), to the effect that [p. 760]:

> Scarcely any sum could compensate a labouring man for the loss of a limb yet you do not in such a case give him enough to maintain him for life.

Again BRETT, J., in *Rowley* v. *London & North Western Ry. Co.* (6) says, at p. 231:

> . . . they must not attempt to give damages to the full amount of a perfect com-

pensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation.

As I say, that was the sum there decided to be awarded. In that case, Mabel Alice Rose, who was killed in a motor car collision, was a younger woman than Milly Mills, the woman in this case. She is described in the report as a girl, and I think she was some A 23 years of age. Other things being equal, applying the principle of *The Aizkarai Mendi* (2), it would appear that her expectation of life, the reasonable duration of which is a factor to be considered, would be greater than that of the woman in this case, who was aged 34. This woman, it is true, had 4 children. Whether, therefore, she enjoys life B the more or the less I am unable to determine, and I do not seek to inquire. However, the fact emerges, not, as I say, that in the present case the judge has given slightly more or slightly less than the sum of £1,000, which by this court was considered to be a fair assessment for that also perfectly healthy woman aged 23 years, but that he has thought C fit to give double that sum.

Taking all these matters into consideration, I think that it is difficult to say, when this court itself has stated the damages for loss of expectation of life for a healthy woman of 23 to be £1,000, that to double that sum is not an entirely erroneous estimate of damage by reason of its D excess. Had the sum been above £1,000, in the neighbourhood perhaps of £1,200 or £1,300, or had it been less, I think that this court would not have interfered, but I do think that to double the sum which this court thinks a fit assessment for the loss of expectation of life of a woman of 23 when we are dealing here with a woman of 34 does constitute such an E erroneous estimate as calls for intervention. I do not say that this sum of £1,000 which was awarded is in any way to be regarded as a fixed limit, because one must always bear in mind that the circumstances in every case differ in some particulars, but, as SCOTT, L.J., said in *Bailey* v. *Howard* (7), at p. 458 ([1938] 4 All E.R., at p. 830): F

> Whether ultimately any sort of scale will be worked out, or whether the assessment will remain permanently quite empirical, one cannot say; . . .

Previously he had spoken, at p. 458 ([1938] 4 All E.R., at p. 830), of the

> gradual working out, chiefly through the common sense of juries, of the sort of figures that in English civilization of to-day are to be regarded as reasonable for G damages under that particular head.

I venture to express the hope that judges and juries, in dealing with this matter, will not overlook the fact, among other facts, that this court has itself assessed the sum of £1,000 as a reasonable and proper sum for a woman aged 23, in a healthy condition of life, without illness and with- H out misfortune. It is an indication, therefore, of what this court thinks to be the sort of sum which is appropriate in such a case, at any rate, as a maximum. It is interesting to observe in this connection, although it does not directly arise in this case, that in cases of infancy sums of a similar nature have been upheld. In *Bailey* v. *Howard* (7), to which

I referred, £1,000 was the amount awarded, and in *Gambling* v. *Benham* (3), the amount was £1,200. Fortunately, in this case, we have not to consider the problem of infancy. When infancy cases are under consideration, what I have said as to the assistance which this court can give to judges and juries by the amounts which it thinks A reasonable or unreasonable may possibly be unaffected. In the present case, we are dealing with an adult, and the adult case where this court itself has already fixed the damages is *Rose* v. *Ford* (4).

I would only add this in conclusion. While I regard the decision of *Rose* v. *Ford* (4) as the more important case, that was not a case B where the court said it would not interfere, but was itself a direct assessment by this court of what it thought were the proper damages. In my opinion, to give double what was given in that case to a younger woman in a similar state of health is so excessive that I do not think the amount can stand.

C Then follows the second problem which I have indicated. It being decided that the judge's judgment on this head cannot stand, what is the right sum ? We have come to the conclusion that the proper sum to be awarded in this case is the same sum as that which was awarded in *Rose* v. *Ford* (4), and we think that the sum of £1,000 should be substituted for the sum of £2,000 on that head. D

Next I come to the question of the £200 awarded for pain and suffering. The evidence on that matter is contained partly in a medical report, dated Jan. 25, 1940, before the court, from Mr. Maurice Young, house surgeon at the London Hospital, and partly from the evidence of the E husband. I regard the medical report in this matter as probably the more reliable. The husband was suffering from grievous bereavement. He was not allowed to see his wife on her admission to the hospital, and I should think that if there is any discrepancy, an objective account of the woman's sufferings is more likely to be found in the medical F report. According to that report, when she was brought in on May 3, she was throwing herself about the bed, and was in a state of intense irritation. I rather think that that indicates reflex irritation, because the report goes on :

> No response to questions, but repeatedly demanded to get up.

G

However, she became quieter, and the nervous system was normal. On May 7, she became very restless, and resented interference, and suddenly at midnight on May 7 her respirations became feeble, and dropped to about 2 per minute, when she suddenly collapsed and died. The doctor H states :

> The degree of pain which the plaintiff suffered is extremely difficult to estimate owing to the very marked restlessness. This restlessness was probably due to cerebral irritation rather than to actual pain.

The husband says that, when he saw her at the hospital on May 5, she was not conscious in the morning. She recovered consciousness in the afternoon, when he went there again, and then appeared to be very much better. She called him by name, and called for water. She said: "I am on fire. Give me water." He was with her about an hour.

In these circumstances, the question arises whether this woman, who was certainly unconscious for the very greater part of the time she was in the hospital, should rightly be awarded £200 for pain and suffering. One must assume on this heading that on May 7 no further claim could be made. It is not a continuing pain and suffering. It is pain and suffering for those 4 days, and for no more. I need not repeat what I have already said about the assistance and guidance of earlier cases in this court, because what I have said in the case of expectation of life applies equally to the caution with which it should be used, and to its value, in the case of pain and suffering. In *Rose* v. *Ford* (4), to which I have referred, the woman was in the hospital in a state of complete unconsciousness for 4 days before she died, and her leg had to be amputated. There also it became necessary for us to consider the question of assessing damages as we were asked by counsel to do so. I said, at p. 104:

> As we have been asked to assess such damages here by both parties, in my opinion £20 would be a sufficient sum, more especially having regard to the fact that the deceased, according to the doctor, throughout the 4 days was in a state of coma.

That is the sum on which the court ultimately decided on that head, and on that matter there was no appeal to the House of Lords, nor was there on the allocation of £1,000 for loss of expectation of life.

Therefore, applying again the first question, I find it impossible to say that £200 is not an excessive sum to give to this woman, who was in the hospital for 4 days. True it is that during that time she was conscious for a short time, but she was mostly unconscious, and did say, according to the husband, that she felt on fire, and wanted water. We think that the proper sum to be awarded on this head is £50 in substitution for the £200. Therefore, the judgment will be varied to the extent that there will be judgment for £1,000 on the loss of expectation of life vested in the administrator, £50 in respect of pain and suffering, and the £28 10*s*. which remains untouched with regard to the funeral expenses.

Clauson, L.J.,; I find myself in complete agreement with Slesser, L.J., on all the points in this case. Therefore, I do not propose to add anything.

Goddard, L.J.: I think that the damages awarded for loss of expectation of life are so excessive as to be an entirely erroneous estimate. For myself, I base my opinion not on the fact that in *Rose* v. *Ford* (4), a girl of 23 was only awarded £1,000 by this court, for one cannot set up any tariff in these cases, but on somewhat broader grounds. Though only a short time has elapsed since *Rose* v. *Ford* (4) was decided in the

House of Lords, one cannot help observing that damages awarded under this head have increased, are increasing, and ought, as I think, to be diminished. In my opinion it is time that this court showed its disapproval of the award of sums which, as I read the opinions of **LORD WRIGHT** and **LORD ROCHE**, who dealt in that case with this matter A of amount, not only were never contemplated by them, but, indeed, offend against the views which they expressed. I will refer to some passages. **LORD WRIGHT** said, at p. 849 ([1937] 3 All E.R., at p. 373):

> I think both on principle and on authority this element of damage, that is, for the shortening of life or for the loss of the normal expectancy of life, was properly taken into calculation in *Flint* v. *Lovell* (1), and should be considered here, as B GREER, L.J., thought. The jury should be directed that they are entitled to take it into consideration, along with other relevant elements of damage, using their common sense to give what is fair and moderate, in view of all the uncertainties and contingencies of human life. Special cases may occur, such as that of an infant or an imbecile or an incurable invalid or a person involved in hopeless difficulties. The judge or jury must do the best they can in the circumstances in this as in other cases. The precedents cited above show that an assessment can be made.

C Again, **LORD ROCHE**, who deals with this matter at greater length than any of the other noble and learned Lords whose opinions are reported, after referring to *Reid* v. *Lanarkshire Traction Co.* (8), said, at p. 860 ([1937] 3 All E.R., at p. 380):

> In the latter case LORD SANDS, dealing with a similar matter, said: " Still there D is something in it which I confess puzzles me, once it is conceded that a man is entitled to compensation for the shortening of his life. But the matter is so hedged with metaphysics that, were I charging a jury, I think I should be disposed to be content to tell them that the shortening of life was an element which they were entitled to take into consideration in measuring the damage suffered by the deceased, and to leave it to them, without any strict analysis of the content of the idea, to assess the damages, contenting myself with warning them that the weight to be E given to this element must be moderate, and that they must not consider what price the man would have put upon his life."

Towards the end of his opinion, he said at p. 861 ([1937] 3 All E.R., at p. 381):

> I would add that I confess to some apprehension lest this element of damage may now assume a frequency and a prominence in litigation far greater than is F warranted in fact, and becoming common form may result in the inflation of damages in undeserving cases, or, more probably perhaps, may become stale and ridiculous to the detriment of real and deserving cases, such as the present. But the abatement of these possible evils may be left to the good sense of judges and juries, and I may be permitted to express the hope that the assistance of a jury—in my judgment a most admirable tribunal for such a purpose—may be not seldom availed of in the future.

G I am afraid that the present tendency is exactly in the direction which **LORD ROCHE** feared and deprecated. I adhere to what I ventured to say in *Gambling* v. *Benham* (3) as to the practical difficulty which arises because of the fact that, in spite of the theory of law, one is in reality awarding a *solatium*, not to the person who has suffered the wrong, but H to his relatives, or, it may be in some cases, even to his creditors. When one is dealing with an almost metaphysical subject, one cannot approach it from the point of view of what is the value to be put on human life. The only guide is that it is to be moderate. We are to eliminate questions of whether the person is rich or poor, or, taking again the opinion of **LORD ROCHE** as a guide, if we except the extreme cases of a miser or a poor man sunk deep in misery, earnings or income are irrelevant. I read this as meaning that for this purpose there is to be no difference between the wife or child of the labourer and the wife or child of the millionaire, and, if I may say so, I respectfully agree with this view. If, then, we are to try to strike a mean, and have regard to the normal and average on this matter, upon which there can be no other principle, in my opinion, the court should at least begin to think in hundreds, and not in thousands. It should be remembered that *Rose* v. *Ford* (4) shows that loss of expectation of life has always been an element which the courts may take, and have taken, into account, though until the passing of the Law Reform (Miscellaneous Provisions) Act, 1934, the question could not have arisen where the injured person had not survived the accident. I am fairly confident that no court or jury before the Law Reform (Miscellaneous Provisions) Act, 1934, ever added as much as £1,000 to the damages awarded to a plaintiff who had survived an accident on this ground, although his chances of a long life may have been seriously impaired. Of course, different minds have different ideas as to what is moderate, and to seek for a mean, a normal or an average where there is really no guide is very like the illustration given by LORD BOWEN of a blind man looking for a black cat in a dark room. If I am right in believing that the true view is that neither station in life nor income nor worldly prospects ought, except in wholly exceptional cases, to influence the award, and that it should be, as near as circumstances permit, and making due allowance for different ages, the same for all, I repeat that, in my opinion, we ought to think in hundreds, and not in thousands. Had the task of fixing the damages fallen on me in the first instance, I am not sure that I should have given as much as £1,000, but, as that is the figure which my Lords think proper, I certainly will not disagree.

Appeal allowed. Judgment to be entered for the plaintiff against the two defendants for £1,078 10*s. and costs. Leave to appeal to the House of Lords.*

Solicitors: *William Charles Crocker* (for the appellants); *Hewitt, Woollacott & Chown* (for the first respondent); *Darracotts* (for the second respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

SMITH *v.* SMITH (OTHERWISE HAND) (BY HER GUARDIAN).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **April 24, 1940.**]

Divorce—Nullity—Recurrent fits of insanity—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 7 (1) (*b*).

The parties were married in Oct., 1938. For several years prior to the marriage the wife had suffered from intermittent unsoundness of mind, which had broken out on at least two different occasions, one being while she was undergoing certain voluntary treatment at a mental hospital. She exhibited certain peculiarities soon after marriage, and in July, 1939, was confined in a private mental hospital under a reception order. The husband petitioned for a decree of nullity under the Matrimonial Causes Act, 1937, s. 7 (1) (*b*), on the ground that at the time of the marriage the wife was subject to recurrent fits of insanity :—

HELD : (i) the word "fits" in sect. 7 (1) (*b*) applied equally to insanity and to epilepsy.

(ii) the words "unsound mind" and "insanity" in the subsection had the same meaning.

(iii) at the time of the marriage the wife was, on the evidence, subject to recurrent fits of insanity, of which the husband was ignorant, and he was, therefore, entitled to a decree of nullity.

[**EDITORIAL NOTE.** This is the first occasion upon which the court has had to consider the additional ground upon which a decree of nullity can be granted contained in sect. 7 (1) (*b*) of the new Act of 1937. The general application of this enactment is considered, and in particular its application to a case where a spouse is subject to recurrent fits of insanity at the time of the marriage. The intermittent nature of the disease makes it possible that the other spouse may be quite unaware of its existence, and that feature is fully discussed in the judgment herein.

AS TO INSANITY AS GROUND FOR NULLITY, see HALSBURY, Supp., Divorce, para. 945A. For the Matrimonial Causes Act, 1937, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, p. 335 *et seq.*]

HUSBAND'S PETITION for a decree of nullity on the ground that the wife was subject to recurrent fits of insanity at the time of the marriage. The facts are fully set out in the judgment.

J. E. N. Russell for the petitioner.

W. B. Frampton and *C. B. Hobhouse* for the respondent.

SIR BOYD MERRIMAN, P. : The marriage took place on Oct. 15, 1938. It is important to observe, first, that the petitioner cannot succeed unless he is able to satisfy three provisos, which are set out in the latter half of sect. 7—namely, (i) that at the time of the marriage he was ignorant of the facts on which his petition is based ; (ii) that proceedings were instituted within a year from the date of the marriage ; and (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds on which he is relying. It is conceded, and the evidence is all one way, that the petitioner was ignorant of the facts on which he relies. It is quite plain that proceedings were instituted within a year of the date of marriage, and, again, the evidence is all one way that there has been no marital intercourse since the discovery of the facts. These provisos, therefore, are satisfied if the petitioner is able to prove the essential fact that at the time of the marriage the wife was subject to recurrent fits of insanity.

As this is the first case relying on this ground of nullity which has been presented since the Matrimonial Causes Act, 1937, came into force, I think perhaps I ought to say a word or two about the reasons for my decision. The material part of the wording of sect. 7 is as follows :

> (1) In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground . . . (*b*) that either party to the marriage was at the time of the marriage of unsound mind . . . or subject to recurrent fits of insanity or epilepsy . . .

It is to be observed that unsoundness of mind at the time of the marriage is a ground, and that being subject to recurrent fits of insanity or to recurrent fits of epilepsy is also a ground.

At one time in the course of the argument, it was suggested, but the suggestion has not been pressed, that the use of the word " fit " was inapt in connection with insanity, though not in connection with epilepsy, and attention was drawn also to the fact that, whereas unsoundness of mind was specified as being a ground, if it exists at the time of the marriage, the word " insanity " is used in connection with the particular ground which I am considering—namely, that of being subject to recurrent fits of insanity. Quite rightly, however, in my opinion, not only at the bar, but also in the witness-box, any attempt to distinguish between the words "unsoundness of mind" on the one hand, and "insanity" on the other, has been disclaimed. I say quite rightly, because I find that in THE OXFORD DICTIONARY the first meaning of " insanity " is given as follows :

> The condition of being insane; unsoundness of mind as a consequence of brain disease; madness, lunacy.

To take the first of those, " The condition of being insane," I find that " insane " is defined as follows : " Not of sound mind ; mentally deranged." I do not pretend to know why the one phrase is used in one part of the section and the other phrase in the other part, but I agree with counsel and the doctors that it is impossible to distinguish between unsoundness of mind and insanity.

I now consider the phrase " subject to recurrent fits of insanity," and I cannot myself see, nor has anybody really seriously suggested, that there is any difficulty about the use of the word " fits." Again turning to the same authority, I find that the word " fit " is defined, amongst other definitions, as " a paroxysm," and as a sudden and severe but transitory attack of illness, especially a paroxysm of lunacy. " Paroxysm " is defined as follows :

> *In pathology.* An increase of the acuteness or severity of a disease, usually recurring periodically in its course . . .

Speaking for myself, for the purposes of this case I find no difficulty in a paraphrase of the section which would read that the wife was subject to an increase of the acuteness or severity of unsoundness of mind recurring periodically in its course. It seems to me exactly to express the facts of this case.

The wife is at present confined, and has been confined since July, A 1939, in The Old Manor, Salisbury, a private mental hospital. She is there detained under the Lunacy Acts because she is of unsound mind. I am not overlooking the fact that Dr. J. J. Martin, who was called to examine her on Mar. 11, told me that on that day taken by itself, isolated from previous history, he would not have certified her, but, taking into B account the whole history, to some of which it will be necessary for me to refer, it was perfectly obvious that she had suffered from unsoundness of mind, and that that unsoundness of mind had broken out on at least two occasions—namely, once in 1932 when she was in the Maudsley Hospital, and again prior to, and after, her admission to The Old Manor C at Salisbury. Indeed, Dr. Martin himself said that, taking his own examination and the history together, his diagnosis was that she was subject to recurrent attacks of confusional insanity associated with excitement and with transient hallucination. I am not prepared to accept, however, that the history of the respondent's unsoundness D of mind is limited to these two outbreaks of which Dr. J. J. Martin was speaking. I am satisfied on the evidence that there was a great deal more, because there is a complete record of it during her confinement in the Maudsley Hospital. When I use the word " confinement," let it be understood that she was there as a voluntary patient. She was, in fact, E withdrawn from there on the responsibility of her sister, who has given evidence before me, and against the will of the authorities of the hospital. The wife was admitted there on May 2, 1932. I have before me the record her condition on admission. Nobody has disputed, or could possibly dispute, that it is a record of unsoundness of mind.

F The next thing is, perhaps, more difficult. The husband was formerly married to a great friend of his present wife, and, partly as the result of an accident to the husband, his present wife happened to be in the house at the time when the former wife fell ill with a fatal attack of influenza, and, I gather, supervening pneumonia. She died in Jan., G 1935. The present wife was in the house at the time, and stayed on for a few days afterwards, she herself suffering from an attack of the same type of influenza. Both of them were being attended by Dr. Walter. Both to Dr. Walter and to another visitor to the house, the wife exhibited very strange symptoms, sufficiently strange to attract H Dr. Walter's attention at the time—not in the light of future events, but at the time. Of course, it is quite true that the depression which was then apparent may have been nothing more than a common symptom of influenza, without involving any suggestion of unsoundness of mind, but there was enough to indicate that it was referable to a recurrence of a comparatively mild, but patent, form of latent unsoundness of mind.

The next fact is the marriage. I am prepared to assume that nothing attracted attention between Jan., 1935, and the marriage in Oct., 1938. I have already found that the husband had not the faintest idea that there was any unsoundness of mind. Actually, he attributed the oddity in 1935 to the influenza.

The wife was seen on Dec. 10, 1938, by Dr. Walter, who was very clear A
about her condition, although the husband would not believe it. Dr. Walter thought that there was something definitely wrong mentally, and insisted on Dr. Craig being called in. The latter is quite positive that she was showing symptoms of unsoundness of mind in the most marked way. It is quite true that at the time he diagnosed the category of B
schizophrenia, symptoms of which, he says, are still present, but he thinks that the proper diagnosis is in another category in which manic depression alternated. To my mind, the change from one category to another is of no importance whatever. It is quite obvious that he was clear beyond the slightest doubt that she was of unsound mind. C
It seemed that in five or six weeks she returned more or less to normal. Then, again, all was quiescent between this date about the middle of January, when she recovered, and July, when there was the final outbreak—that is, final so far as I am concerned—when she was received under order into The Old Manor, after having been for 3 days in a D
nursing-home. It was then, and then only for the first time, that this matter about the Maudsley Hospital became known. The husband did not know about it. The doctor did not know about it before then, but the wife had a recollection about it, which was at any rate sufficiently clear to put them on the track. E

In those circumstances, I have to decide whether or not, on the date when this marriage ceremony took place, the wife was subject to recurrent fits of insanity. I can only say that it seems to me to be impossible, on the evidence, to hold otherwise. There was unsoundness of mind, I dare say in slight degree, the whole time. That may or may F
not be so, but there was unsoundness of mind quite plainly in 1932, quite plainly in Dec., 1938, and quite plainly in July, 1939, with intervals of quiescence in between. I have no doubt whatever that, on the date when the wife went through the ceremony of marriage, she was subject to recurrent fits of insanity. By that I understand that, though she was G
not at the time suffering from a fit of insanity in the sense in which that term is used according to the dictionary, yet she was subject to recurrence of such a fit, and such a fit occurred twice within the first year of the marriage. In my opinion, the husband has proved his case beyond the slightest shadow of doubt, and is entitled to a decree of nullity. H

Decree of nullity granted.

Solicitors: *Parker, Garrett & Co.* (for the petitioner); *Braikenridge & Edwards* (for the respondent).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

R. *v.* COWELL.

[COURT OF CRIMINAL APPEAL (Hawke, Charles and Hilbery, JJ.), **April 8, 1940.**]

Criminal Law—Evidence—Admissibility—Confession by prisoner—Allegation that statement obtained by improper means—Right of prisoner to give evidence in support of allegation.

A prisoner, after being cautioned, made a statement to the police confessing to having committed a murder. At the trial objection was taken to the admissibility of this statement, the prisoner alleging that it was obtained from him by improper means and he was allowed to give evidence to that effect. The judge ruled that the statement was admissible, and the prisoner was convicted upon this statement :—

HELD : the court must be satisfied that there is *prima facie* evidence that the statement was not made as a result of any inducement or threat and, if the circumstances were such that a caution was necessary, that it was made after a proper caution. It is proper for the court in such circumstances to allow the prisoner to give evidence in support of his allegation that the statement was improperly obtained.

[**EDITORIAL NOTE.** The admission or exclusion of the evidence of the confession in this murder trial was necessarily decisive of the issue, because it was practically the only evidence of the prisoner's guilt. The questions whether the prisoner could take the objection that such confession was wrongly obtained, and whether he himself could give evidence on this point, are here fully discussed.

AS TO CONFESSIONS BY THE ACCUSED, see HALSBURY, Hailsham Edn., Vol. 9, pp. 203-207, para. 291 ; and FOR CASES, see DIGEST, Vol. 14, pp. 410-426, Nos. 4303-4498.]

Cases referred to :

(1) *R.* v. *Baldwin* (1931), 23 Cr. App. Rep. 62 ; Digest Supp.

(2) *R.* v. *Thompson*, [1893] 2 Q.B. 12 ; 14 Digest 412, *4314* ; 62 L.J.M.C. 93 ; 69 L.T. 22.

APPLICATION for leave to appeal against a conviction for murder at the Lewes Assizes. The appellant was convicted before HUMPHREYS, J., at the Lewes Assizes of the murder of Anne Cook on Aug. 21, 1939. At Brighton Police Station on Oct. 22, the appellant confessed to having committed the murder. He was then cautioned by a police officer, but made a statement which was taken down by the police officer, read over to the appellant and signed by him. The appellant was subsequently convicted on the strength of this confession. He alleged that he had been induced to make the statement by a promise that he would afterwards be allowed to go home to his wife.

Eric Neve, K.C., and *Alban Gordon* (for *C. J. T. Pensotti* on war service) for the appellant.

John Flowers, K.C., and *Gerald A. Thesiger* for the Crown.

HAWKE, J. [delivering the judgment of the court]: At a very early stage in the trial of the appellant, it must have become quite obvious to anybody connected with this case that, but for what the man said himself, there was little or no chance of his being convicted of the offence. There is no doubt in the mind of the court that his conviction followed because his confession was so clear, and was, one may add, corroborated, in the sense that in that confession he said things which nobody but the murderer apparently could have known, particularly with regard to certain glasses which, for the purpose of refreshment, had been taken to the spot where the body was found. Nobody knew of their existence, in spite of the careful search which had been made. He described them, said how they had been used, and how they were left there. When the police went the next day, after considerable search they found these glasses there. I am not saying that that is the only respect in which, when this man made this statement, he displayed knowledge which he could hardly have possessed if he had not been the man who on that evening did the thing which he himself said he did. Counsel for the prisoner most properly, on his instructions, took objection to the admissibility of this statement, and thereupon HUMPHREYS, J., asked the jury to retire while he heard discussion as to whether or not this statement could be admitted. The court wish to say this. In the absence of the jury during the discussion as to the admissibility of this statement, the question arose as to whether the prisoner himself could be called as a witness. Counsel for the prisoner, bowing to what he understood to be laid down in *R.* v. *Baldwin* (1), himself hesitated as to whether he should call the prisoner. HUMPHREYS, J., thought that he could, and, indeed, it is only fair to the judge to say that he encouraged counsel to call the prisoner. Whatever *R.* v. *Baldwin* (1) decided, this court is of opinion that, in such circumstances, it is proper to allow the calling of the prisoner himself as a witness if the justice of the case requires that it should be done. I might perhaps read a passage from what was said by HUMPHREYS, J.:

> I think, upon this evidence, that this statement is admissible, but it may not be true. That is not for me to decide. It is admissible, and, therefore, I think counsel would be entitled to go into all the circumstances hereafter before the jury. I will add that it will be open to counsel for the appellant, in my view, to ask the jury not to accept that statement, or these statements, if he is so advised, on any ground which he chooses to put before the jury. All I am ruling now is that, upon the evidence which is before me, and which must necessarily be incomplete at this stage, there is no ground for saying that the statement is inadmissible in law upon any of the well-known grounds referred to by CAVE, J., in *R.* v. *Thompson* (2), which still remains the leading authority upon this matter. I would just desire to add this. I have been referred to *R.* v. *Baldwin* (1). That case seems to me to be unsatisfactorily reported. The headnote is as follows: "If the judge at the trial is satisfied that the defendant was properly cautioned before he made a statement, that statement is admissible in evidence:"—that is a platitude, of course—"the defendant is not entitled at that stage to give evidence that the statement was improperly obtained." Nevertheless, I find great difficulty in understanding how a judge can be satisfied about a thing when he has heard only one side. I venture to say, with the greatest respect, that I should follow that decision loyally if that was in fact the decision of the court, but I cannot help thinking that it may not be, and that what the law is is this. It may be that what a judge has to be satisfied of is that there is *prima facie* evidence before him that a statement is admissible in that it was not made as a result of any inducement or threat, and that it was made after the proper caution, if a caution was necessary in law in the circumstances. If, on the other hand, the law is—but I do not think this is so—that the judge must be satisfied that in truth and in fact the statement was made not as the result of any improper inducement, then, for my own part, I fail to see how any judge, either to his own satisfaction or to that of others, could decide such a question without hearing both sides.

I may say that, although the cases do not appear to have been reported, this is a principle upon which HILBERY, J., and I have had to act on previous occasions. It is a very unpleasant duty to have to perform, particularly in a murder trial, because very often the admission or exclusion of the evidence is decisive of the case. However, that being the position, this evidence was admitted by HUMPHREYS, J., who thought that he could not exclude it. The matter is strengthened by the fact that thereafter there was the most complete discussion before the jury as to whether this statement was obtained by any unfair means, and the judge told the jury very plainly to disregard the whole statement if they thought that it might have been induced by unfair means. They must have decided that what was said in the statement was freely said by this man, and was the truth, for they convicted him.

Application dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

SOHO SQUARE SYNDICATE, LTD., AND ANOTHER *v.* E. POLLARD & CO., LTD., AND ANOTHER.

[CHANCERY DIVISION (Farwell, J.), **May 6, 7, 8, 1940.**]

Emergency Legislation—Mortgage—Appointment of receiver—Leave of court not obtained—Mortgagor's consent to appointment—Validity of appointment—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2).

The second plaintiff was the trustee of certain property beneficially owned by the plaintiff syndicate. He was also the chairman of the board of directors of that syndicate. In Apr., 1939, he executed a mortgage in favour of the first defendants. The first payment of interest under the mortgage became due on June 24, 1939, and remained unpaid. Thereupon on Sept. 25, 1939, the second plaintiff, without the consent of the plaintiff syndicate, and in ignorance of the relevant provisions of the Courts (Emergency Powers) Act, 1939, consented to the appointment of the second defendant as receiver of the mortgaged property. The plaintiffs now claimed, *inter alia*, a declaration that the appointment of the second defendant as receiver of the property was illegal and void, on the ground that the leave of the court had not been obtained prior to his appointment. The defendants contended that, as the second plaintiff had expressly consented to the appointment of a receiver, the leave of the court could be dispensed with:—

HELD: the Courts (Emergency Powers) Act, 1939, being designed to protect the public, the second plaintiff was not in a position to contract out of its provisions, and the appointment of a receiver was void, notwithstanding the consent of the second plaintiff to the appointment.

[**EDITORIAL NOTE.** In a case within the Courts (Emergency Powers) Act, 1939, a mortgagee cannot appoint a receiver with the consent of the mortgagor. The Act makes it necessary that he should obtain the leave of the court to make the appointment, and it does not permit any contracting out. Certain decisions under the Act passed during the Great War, which suggest that, by consent, an appointment may be made without an application to the court, were decided without full argument, and, in the present case, have not been followed.

As to Appointment of Receiver, see HALSBURY, Hailsham Edn., Vol. 23, pp. 444-451, paras. 654-662; and for Cases, see DIGEST, Vol. 35, pp. 520-531, Nos. 2487-2615.]

Cases referred to:

(1) *Re Sandow, Ltd., Skipwith* v. *Same,* [1916] W.N. 262; 39 Digest 22, *243.*

(2) *Salford Union* v. *Dewhurst,* [1926] A.C. 619; 37 Digest 215, *105*; 95 L.J.Ch. 457; 135 L.T. 514; *affg.,* [1925] Ch. 655.

Action for a declaration that the appointment of a receiver was void and illegal by reason of the relevant provisions of the Courts (Emergency Powers) Act, 1939, and for an injunction restraining the second defendant from continuing to act as receiver. In 1937, Commander Rich was the registered proprietor of Nos. 23, 24 and 25, Soho Square, London. In the same year he formed a company known as the Soho Square Syndicate, Ltd., of which he was the chairman of the board of directors. He sold the above property to the company, but executed a declaration of trust of the property, declaring that he would deal with the property as the syndicate should direct. He had also entered into a contract with the first defendants, E. Pollard & Co., Ltd., for the demolition of the existing premises, and for the rebuilding of new premises upon the same site. For the purpose of securing the cost of these building works, he gave the first defendants a charge upon the property. This charge was given before the formation of the company, but the first defendants were notified of its formation. In 1939, when the new buildings were nearing completion, the first defendants released their charge upon the property, and a first charge was given to the Norwich Union Insurance Co., the money raised by this latter charge being applied in payment of the greater part of the sum secured by the first defendants' charge. The first defendants, however, were granted a second charge to secure certain money still owing to them. From June, 1939, the interest due under this second charge was outstanding. After Sept. 1, 1939, the first defendants appointed a receiver, and to this course Commander Rich consented, but without his attention having been drawn to the provisions of the Courts (Emergency Powers) Act, 1939. The appointment of the receiver was not brought to the knowledge of the syndicate, but, as soon as the board became aware of it, they strongly objected to it. In these circumstances, the following subsidiary questions arose: (i) whether Commander Rich consented, and, if so, whether he did so with a full knowledge of his rights in the matter, and (ii) whether the consent of Commander Rich was sufficient without that of the syndicate; but the principal question was whether a receiver could be appointed, even with the consent of the mortgagor, without an application to the court under the Courts (Emergency Powers) Act, 1939.

C. E. Harman, K.C., and *Herbert Hart* for the plaintiffs.

Roger W. Turnbull for the defendants.

Farwell, J.: I will first assume that Commander Rich did consent to the appointment of a receiver, as in fact he did, and, on that assumption, I will now proceed to consider what is, to my mind, the really important question in this case—namely, whether or not that consent was sufficient to take the case out of the Courts (Emergency Powers) Act, 1939, and to enable the mortgagee to make the appointment without the leave of the court. The preamble to the Act is in these terms:

> An Act to confer on courts certain powers in relation to remedies in respect of the non-payment of money and the non-performance of obligations (including powers in relation to bankruptcy and winding-up proceedings), and to make provision for purposes connected with the matters aforesaid.

Sect. 1 provides as follows:

> (1) Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money . . .

Then there are certain provisoes to which I need not refer.

Subsect. 2 is the really relevant sub-section, and it provides as follows:

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court:—(*a*) to proceed to exercise any remedy which is available to him by way of (i) the levying of distress; (ii) the taking of possession of any property or the appointment of a receiver of any property; (iii) re-entry upon any land . . .

Then there are certain matters to which I need not refer. Then subsect. (4) provides as follows:

> If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsects. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.

So far as the appointment of a receiver is concerned, as between mortgagor and mortgagee, the effect of this Act, as I read it, is this. Before this Act came into operation, a mortgagee was entitled without any leave of the court, in proper circumstances, to appoint a receiver, and, assuming that the necessary conditions had been complied with, there could be no objection to such an appointment. It was a privilege given to a mortgagee for the protection of himself and the property subject to the mortgage which he could exercise at his own volition. This Act steps in, and it provides in terms that a person shall not be entitled, among other things, to appoint a receiver without the leave of the court. Thus, immediately this Act came into operation, a mortgagee was not entitled to appoint a receiver except with the leave of the court. That is to say, one of the powers which he was entitled to exercise in normal circumstances was taken away from him, and he was no longer in a position to appoint a receiver without first obtaining the leave of the court. It is said that, notwithstanding that provision, if the mortgagor chooses to consent to the appointment by the mortgagee of a receiver, then the obligation of first obtaining the leave of the court which rests upon the mortgagee under this Act has gone, and there is no longer any such obligation and, I suppose, it must necessarily follow from the argument on behalf of the defendants that the effect of that consent is to recreate (as it were) a power which existed in the mortgagee before this Act came into operation. To my mind, it is a little difficult to appreciate how a power, if it is taken away from a person by an Act of Parliament, can be recreated and revested in that person merely by the consent of the other party. It may be, however, that that is not a real difficulty, and I have been referred, and properly referred, to the corresponding Acts which came into being during the last war, the Courts (Emergency Powers) Acts 1914 to 1916. Under those Acts, the way in which matters were dealt with was somewhat different from the way in which matters of this sort are dealt with in this Act, but the language, so far as it relates to this particular question, has a very close resemblance to the language in this Act. It appears that there were three decisions by three different judges under the old Acts by which it was held that the necessity for obtaining the leave of the court was something which could be dispensed with by the consent of the person on the other side. The decisions to which I have been referred are, first, a decision of SARGANT, J., in *Re Sandow, Ltd.* (1). In that case, there does not appear to have been any argument at all about the matter, but SARGANT, J., did say in the course of the argument that the Act of 1916 gave the defendants a personal right which might be waived by them, and they appointed a receiver.

That decision was followed, again, I think, without any particular argument upon it, by P. O. LAWRENCE, J., in a later case. In that later case, P. O. LAWRENCE, J., was referred to the decision of SARGANT, J., in *Re Sandow, Ltd.* (1), and he followed it. I am told that there is also a decision of ATKIN, J., which is unreported, but counsel for the defendants has been able to get hold of some of the papers, and it appears that the judge held that the right to levy a distress, or the necessity for getting leave to levy a distress, could be avoided by the consent of the person in question. Thus I am faced with the fact that the three judges appear to have felt no difficulty in coming to the conclusion that, under the earlier Acts, the necessity for the mortgagee to obtain the leave of the court before putting his powers into execution was a necessity which could be dispensed with by the person concerned (the mortgagor in this case) giving his consent to the act in question. Although those decisions are not binding on me, because they were decisions under another Act of Parliament, they are decisions which I must carefully consider, and which I must have clearly in mind, when I turn to the consideration of the Act in this case. This Act does not contain any section which prohibits what is commonly known as contracting out of the Act, and it is a matter which must be taken very carefully into consideration, because there are other Acts, which also owe their origin to difficulties arising out of the war, in which such a section is contained. It is said, and said with force, that, had the legislature intended to prevent contracting out of this Act, a section to forbid it would have been inserted in the Act, and, there being no such section, the proper inference to be drawn is that this was a case in which there was nothing to prevent parties by agreement escaping from the obligations imposed by the Act. Of course, it is said that, having regard to the way in which very similar enactments in the Acts during the last war were treated by the judges, the same principles should be applied in this particular case.

In order to introduce into an Act a provision against contracting out when there is no express provision for it, no doubt it is often necessary to consider whether the Act is one which is intended to deal with private rights only, or whether it is an Act which is intended, from the point of view of public policy, to have a more extensive operation. The last Act was held by the judges concerned to be an imposition upon the private rights of the mortgagee as against the mortgagor, and it was held that, in those circumstances, there was nothing to prevent a mortgagor and a mortgagee from agreeing to contract out of the Act. I think that, in considering this question, I must take into consideration the fact that, in the years which have elapsed since the last war and the beginning of the present war, the position with regard to mortgagors and mortgagees has very largely changed. During that period, there has grown up an enormous amount of business with building societies and with like societies for the financing of persons in comparatively humble circumstances who desire to acquire a home through the assistance of building societies. The growth of that sort of business has been phenomenal, and there is no doubt whatever that there is a very large number of comparatively humble people for whom the legislature intended to create some protection. It was felt—I think, again, that this is a matter which I am entitled to take into consideration—that men and women who found themselves unable to make the necessary payments at the due time, and thereby ran a serious risk of being turned out of their homes, should have some protection, if they were people who found that their difficulties were due to the war, either directly or indirectly, and that protection was a protection to be afforded to them by imposing upon the mortgagee the necessity of obtaining the consent of the court before he exercised any power. In the absence of any such legislation, one can well imagine that there might be very far-reaching distress and grievance among a very large number of people, who might feel that they had been dispossessed of their homes without any opportunity of putting their side of the matter, and without being given very much notice of what was being done. It must be remembered that large numbers of persons in that position are persons who have little or no knowledge of law, and, moreover, have little or no opportunity of obtaining legal advice. There is a very large class of persons now, although it was not anything approaching the same size in the last war, calling for some sort of protection.

If it be right to say that, by merely obtaining the consent of the mortgagor, a mortgagee can avoid the necessity of applying to the court for leave, a large part of the protection which this Act was intended to provide, it seems to me, would virtually disappear. People in the position of such persons as I have mentioned might easily be persuaded to give a consent without really knowing exactly what was involved in A
such a consent, and an opportunity of expressing their reasons for their inability to pay, whatever they be, and of stating the difficulties in which they were, which is now afforded to them by this application to the court, would be entirely removed, merely by the obtaining of a consent. This might lead to all sorts of questions as to whether the consent had in fact B
been obtained, whether it was a consent which could be binding, and all sorts of similar questions.

It must be borne in mind that, in the case with which I am dealing, the sums of money are very large, that the parties had every opportunity of obtaining any legal advice they desired, and that in this particular C
case it may well be that there would be no particular reason why the consent should not be sufficient. However, I cannot construe this Act merely with relation to the position between these particular parties. As I have said, this question seems to be a very much wider one than that, and I cannot help feeling, and feeling very strongly, that under- D
lying this Act of Parliament is the clear intention of the legislature to afford some measure of protection to the very large number of persons whom I have mentioned, people who really require to be protected, as it were, against themselves. I am justified, in my view, in taking those matters into consideration, and, on those grounds, coming to the con- E
clusion that, whatever the effect of the earlier Acts, the Act in this particular case is an Act which was intended to have effects more far-reaching than merely an alteration in the rights of individual persons.

I think that it is not irrelevant to read a very short passage from the judgment of Sir Ernest Pollock, M.R., in *Salford Union* v. F
Dewhurst (2). That case went to the House of Lords, where the decision of the Court of Appeal was affirmed. I desire to refer to only one passage in the judgment of Sir Ernest Pollock, M.R., as putting the sort of considerations which may properly be taken into account in considering, in a case of this sort, whether or not contracting G
out of an Act is permissible. In that case, the facts were quite different. It was a case of paying pensions to poor law officers, and it was suggested that a poor law officer could enter into a contract with the guardians in question by which the obligation to pay him or her a pension could be avoided. Sir Ernest Pollock, M.R., said, at pp. 664, 665: H

> I do not think it is possible to read the Act of 1896 as being intended to confer what might be called a private and personal benefit upon individual officers which they can at their will and pleasure renounce. It seems to me that the intention was to put the poor law officers in the same position in which police officers, asylums officers and many other persons have been placed in the interests of the community at large, and that the public should be safeguarded from the melancholy spectacle of seeing a man who had done work and been in a responsible position during years

of his life, suffering from poverty and distress by reason of the fact that no adequate provision has been made to enable him to spend his latter years in reasonable comfort.

If I may paraphrase what SIR ERNEST POLLOCK, M.R., said there, it seems to me that the public should be safeguarded in this case from the melancholy spectacle of seeing a man, owing to difficulties
A arising by the reason of the war, or by reason of his serving his country, deprived of his home or, at any rate, seriously prejudiced, without any protection from the court at all, and from the natural feeling of unrest and grievance which would necessarily arise as a result of a feeling of injustice which would very easily be created
B in the circumstances. I am entitled, as it seems to me, to take those matters into consideration just as much as SIR ERNEST POLLOCK, M.R., took them into consideration in the case to which I have referred to show the sort of principles which moved him to come to the conclusion in that case that the Act was not one out of which the parties could
C contract, and it seems to me that those principles ought to move me in considering the same sort of question in relation to this particular Act.

In my judgment, for the reasons which I have endeavoured to express, this Act is an Act passed not merely for the purpose of dealing with
D the individual rights of private persons. It has a more far-reaching scope than that, and it was intended, as a matter of public policy, to deprive the mortgagee of the powers which he otherwise could have exercised, and to impose upon him, as a condition of the exercise of those powers, that he should first obtain the leave of the court. If
E that be the true view of this Act, then it is immaterial to consider whether there was a consent, and, if so, whether it was a proper consent, and a sufficient consent, and other questions of that sort, because, once one decides that the leave of the court is necessary, whether or not there be consent, and once it is admitted that there was no such leave obtained,
F it must necessarily follow that the appointment was invalid.

Finally, I desire to say this. Nothing which I have said in this judgment could in any way affect, and nothing is intended to affect, the right of the defendants to make the necessary application under the Act, if they see fit to do so, for leave to appoint a receiver. Nor is there any-
G thing in what I have said which is intended to prejudice or influence that application in any way. The application, if the defendants see fit to make it, is one which they are entitled to make, and whether or not they should be given leave, will be decided by the court, without regard at all to any matters which I have decided in this case. I want
H to make it quite clear that any application to the court will be in no way prejudiced or affected by the result of this decision.

Declaration and injunction granted. Defendants to pay costs of action.

Solicitors: *Arthur Pyke & Co.* (for the plaintiffs); *Sydney Redfern & Co.* (for the defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

BISMAG, LTD. *v.* AMBLINS (CHEMISTS), LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Clauson, L.JJ.), **March 7, 8, April 15, 16, May 8, 1940.**]

Trade Marks—Infringement—Monopoly of registered owner of trade mark—Use of trade mark " in relation to " goods—Trade Marks Act, 1938 (*c.* 22), *ss.* 4, 68, 71 (2).

The appellants carry on business in medicinal and pharmaceutical preparations. They are the registered proprietors of the trade mark " bisurated," and sell tablets and powders described as bisurated magnesia tablets and bisurated magnesia powders. The respondents also carry on business in medicinal and pharmaceutical preparations, and sell powders and tablets described as bismuthated magnesia tablets and bismuthated magnesia powders. In order to advertise and recommend their own goods, the respondents issued a poster inviting applications for a list of remedies. This list was in the form of a booklet, in which were set out, along with other remedies, particulars of the appellants' bisurated magnesia tablets and powders, and, in a parallel column, particulars of the respondents' bismuthated tablets and powders. An analysis was set out in each case, and it was claimed that the respondents' goods were the same as those of the appellants, but cheaper. The appellants contended that the list was a user of their trade mark in relation to goods in respect of which it was registered, and, therefore, an infringement within the Trade Marks Act, 1938, s. 4 :—

HELD (MACKINNON, L.J., *dissenting*) : the respondents had infringed the exclusive right of the appellants to the use of the trade mark " bisurated " within the meaning of the Trade Marks Act, 1938, s. 4.

Decision of SIMONDS, J. ([1940] 1 All E.R. 156) *varied.*

[EDITORIAL NOTE. The only question in this case is whether the case of *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1) has been overruled by the 1938 Act. By a majority the Court of Appeal have held that this is the case ; but the judgments must not be taken as fully indorsing the bold claim made by the appellants here, that a trade mark is now a form of monopoly, and that, once it is registered, it is sacrosanct in relation to a particular class of goods. No doubt the result of this decision must be to protect the goodwill obtained by persistent advertising, but, at the same time, it appears to be largely a decision on the facts of this case.

AS TO INFRINGEMENT AND EXCLUSIVE USER, see HALSBURY, Hailsham Edn., Vol. 32, pp. 587, 588, para. 895 ; and FOR CASES, see DIGEST, Vol. 43, pp. 220, 221, Nos. 646-655.]

Cases referred to :

(1) *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1934), 103 L.J.Ch. 106 ; Digest Supp. ; 150 L.T. 402 ; 51 R.P.C. 110.

(2) *Re Coats (J. & P.), Ltd.'s Application,* [1936] 2 All E.R. 975 ; Digest Supp. ; 155 L.T. 127 ; 53 R.P.C. 355.

(3) *Jay* v. *Ladler* (1888), 40 Ch.D. 649 ; 43 Digest 193, *415* ; 60 L.T. 27 ; 6 R.P.C. 136.

(4) *Farina* v. *Silverlock* (1855), 1 K. & J. 509 ; 43 Digest 319, *1405* ; 24 L.J.Ch. 632 ; 25 L.T.O.S. 211 ; *subsequent proceedings* (1858), 4 K. & J. 650.

(5) *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs & Trade Marks,* [1898] A.C. 571 ; 43 Digest 181, *327* ; 67 L.J.Ch. 628 ; 79 L.T. 195 ; *sub nom. Re Eastman Photographic Materials Co., Ltd.'s, Application,* 15 R.P.C. 476.

(6) *Minimax, Ltd.* v. *Moffat* (*trading as L. & G. Fire Appliance Co.*) (1935), 52 R.P.C. 340 ; Digest Supp.

(7) *Champagne Heidsieck et Cie. Monopole Société Anonyme* v. *Buxton,* [1930] 1 Ch. 330; Digest Supp.; 99 L.J.Ch. 149; 142 L.T. 324; 47 R.P.C. 28.

(8) *Singer Manufacturing Co.* v. *Loog* (1882), 8 App. Cas. 15; 43 Digest 264, *1019*; 52 L.J.Ch. 481; 48 L.T. 3.

(9) *Stone (J. B.) & Co., Ltd.* v. *Steelace Manufacturing Co., Ltd.* (1928), 45 R.P.C. 127.

A APPEAL by the plaintiffs from an order of SIMONDS, J., dated Dec. 21, 1939, and reported [1940] 1 All E.R. 156, dismissing an action for infringement of the plaintiff company's trade marks. There was also an allegation of passing off, but SIMONDS, J., found in favour of the plaintiff company on that point, and there was no cross-appeal by the defendants. B The facts are sufficiently stated in the judgments and are fully set out in the report of the case before SIMONDS, J. ([1940] 1 All E.R. 156).

W. Trevor Watson, K.C., R. E. Burrell, K.C., and *James Mould* (for *R. A. B. Shaw* on war service) for the appellants.

W. A. Barton, K.C., and *B. L. A. O'Malley* for the respondents.

C *Watson, K.C.:* The only question is whether or not the use here in question is prohibited by the Trade Marks Act, 1938, s. 4. The evil which sect. 4 was designed to remedy was that certain firms found, after they had expended enormous sums in building up goodwill, that they were faced with the competition of people who said that they could D provide an identical article at a cheaper price. The former Trade Marks Acts were intended to protect the public against the risk of deception as to the origin of the goods. The Act of 1938 has a much wider scope. It is intended, not only to protect the public against deception, but also to safeguard the goodwill which has been built up under the protection E of a registered trade mark. Sect. 4 of the Act has been framed on that footing. In order to bring a case within sect. 39 of the 1905 Act, it was necessary that the trade mark should be used so as to indicate the origin of the goods which were offered by the alleged infringer: *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1). Sect. 4 of the 1938 Act was intended to F abrogate that rule. That section carefully states in language of extreme width the rights which are given, and the Act by other sections delimits those rights in particular circumstances. It is wrong to add to the exceptions provided by the statute. The question is whether or not a man is selling his goods by reference to the trade mark of another man, G and thereby filching from him, to some extent, a part of the goodwill attaching to that trade mark. That is prohibited by the 1938 Act, even though there is no deception. [Counsel referred to *Farina* v. *Silverlock* (4) and *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs & Trade Marks* (5).]

H *Burrell, K.C.*, following on the same side: Under sect. 4 (3), the right to use the mark upon genuine goods is restricted. The words "upon and in connection with" in sect. 39 of the 1905 Act suggest a direct physical connection. One sees the goods and the trade mark at the same time. If, in any given case at the present time, the court is satisfied that the mark is being used by the defendant in a manner which makes his own goods more readily saleable, it would be impossible to contend that the mark was not being used " in relation to " those goods. [Counsel referred to *Re Coats (J. & P.), Ltd.'s Application* (2) and *Minimax Ltd.* v. *Moffat (trading as L. & G. Fire Appliance Co.)* (6), *Champagne Heidsieck et Cie. Monopole Société Anonyme* v. *Buxton* (7).]

Barton, K.C.: The 1938 Act was not intended to give any monopoly. In its essentials, a trade mark, whether registered or unregistered, remains what it was before. The 1938 Act must be considered as trade mark legislation. It is described as an Act to consolidate the law as to trade marks. The opening words of sect. 4 are mere pointers to exceptions, and nothing more. They appeared in the earlier Trade Marks Acts, and no one has suggested that their presence in those Acts extended the monopoly of a trade mark. In construing an Act dealing with property, the proper process is to obtain from the Act as a whole a conception of the property. One should ascertain what acts will constitute an infringement of a proprietor's right in the light of what has been found to be the property in question. This was the course taken in *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1). It is material, however, to consider sect. 4 in relation to sect. 39 of the 1905 Act. The meaning given to the words " upon and in connection with " in that section is seen by reference to Kerly on Trade Marks, 7th Edn., p. 464. The exclusive right given is what it always has been—namely, the exclusive right to use the trade mark in connection with the goods of the proprietor of the trade mark. Sect. 6 of the 1938 Act does not enlarge the rights given by sect. 4. That section makes certain contracts run with the goods, but it does nothing more. There is the clearest distinction made in the pamphlet between the goods of the respondents and the goods of others. There is no attempt to use the trade mark of the appellants in connection with the goods of the respondents. It is true that the respondents say that their goods are similar and of the same composition. They are entitled to do so. The form of competition the respondents have used is perfectly legal: *Singer Manufacturing Co.* v. *Loog* (8).

Watson, K.C., in reply: The effect of the 1938 Act is that a word which is registered, except for the exceptions mentioned in the Act, is sacrosanct in relation to the goods. It is true that the definition of a trade-mark is substantially the same as in the 1905 Act, but the purpose of the definition is to inform one what the words in the Act are about. There is no principle of law which says that if there are other sections in the Act which state explicitly what constitutes an infringement of a trade mark, those sections are overridden by the definition section. [Counsel referred to *Jay* v. *Ladler* (3) and *Stone (J. B.) & Co., Ltd.* v. *Steelace Manufacturing Co., Ltd.* (9).]

Sir Wilfrid Greene, M.R.: This appeal raises for the first time a question of importance as to the effect of the Trade Marks Act, 1938,

s. 4. The appellants, who were plaintiffs in the action, claim that this section has made a far-reaching alteration in the law relating to trade marks, and enables them to treat certain acts of the respondents as being what, previous to the passing of the statute, they would not have been —namely, an infringement of the rights conferred upon the appellants as proprietors of a registered trade mark. SIMONDS, J., before whom the action was tried, was unable to find in the language of the section an intention expressed with sufficient clearness to produce the result claimed, and he accordingly decided this part of the action, the only part now in issue, in favour of the respondents. He held in effect that the section did not in any relevant respect alter the pre-existing law.

The Trade Marks Act, 1938, is entitled:

> An Act to consolidate the Trade Marks Act, 1905, the Trade Marks Act, 1919, and the Trade Marks (Amendment) Act, 1937.

The last of these three Acts never came effectively into force, and it was repealed by the Act of 1938. Nevertheless, it was in the Act of 1937, itself an amending Act, that the amendments in the law which now fall for consideration first appeared, and they must be construed accordingly. Some three years before the passing of the Act of 1937, a departmental committee had reported on the law and practice relating to trade marks. We were invited to look at this report in order to see what was the mischief to which the Act of 1937 was directed. This suggestion was not pressed, and accordingly we did not look at the report. With these preliminary observations, I turn to a short examination of the facts.

The appellants, who carry on business in medicinal and pharmaceutical preparations, are the registered proprietors of the trade mark "Bisurated." There are two registrations, both in Class 3 (Sched. III), the one in respect of "A medicinal stomachic powder for human use," the other in respect of "Chemical substances prepared for use in medicine and pharmacy." The respondents carry on a business in medicinal and similar preparations. Under their trade mark "Bisurated," the appellants sell tablets and powders described as "Bisurated magnesia tablets" and "Bisurated magnesia powders." The respondents sell tablets and powders alleged to be similar in chemical content under the description "bismuthated magnesia tablets," and "bismuthated magnesia powders." This alone would admittedly be no infringement of any right of the appellants. The respondents sell the appellants' tablets and powders as well as their own.

In order to advertise and recommend their bismuthated magnesia tablets and powders, the respondents made use of a poster which invited the reader to "ask for list of over 100 remedies." The list referred to is identified as the booklet which was handed to applicants in the respondents' shop. The object of these two documents, as appears from their language, was to inform the public that the proprietors of what are commonly called patent medicines charge for their goods prices which are excessive in view of the cost of preparing them, and to induce the public to purchase at a lower price goods sold by the respondents, which were, in the majority of cases, alleged to be compounded to a similar prescription. The poster claims that the respondents have:

> . . . devised a simple way of showing you the comparison between "Amblin's Products" and the highly priced advertised goods which any intelligent person can understand. A

It points out the saving which will be effected if the respondents' goods are purchased instead of the advertised patent medicines, and asserts:

> The formulæ are the same. The quality is the same. The price is less. B

There follows a table in several columns, the first of which gives the name of the respondents' preparation, the second its serial number, the third the complaint for which it is suitable, the fourth and fifth the prices, and the sixth the "price of similar patent medicines." In C this table there appears under the serial number 7 a remedy called "Bis Tablets" suitable for stomach digestion at the price of 30 for 6*d.* or 75 for 1*s.*, and the price of the "similar patent medicine" is given as 50 for 1*s.* 3*d.* As appears from the booklet, the respondents' remedy thus identified was their "bismuthated magnesia tablets," and the price of the "similar patent medicine" was the price of the appellants' D Bisurated magnesia tablets. The poster also contains the following statement:

> All our agents have instructions to return money in full to any customer who does not think our prescriptions *are equally as good or better than the highly advertised originals.* E

I italicise the words which are of special significance.

If the matter had stopped there, the appellants would have had no possible ground for complaining that the respondents had infringed their rights as proprietors of the trade mark "Bisurated," since the word does not appear from beginning to end of the document. However, F an examination of the booklet, which must be construed in connection with the poster, carries the "simple way of showing you the comparison" which the respondents claim to have devised a good deal further. The booklet begins with two pages of text headed: "Some Commonsense Facts about Medicine." It points out the high cost of G patent medicines as compared with the cost of manufacture, and explains how and why the respondents can sell "the same thing" at a cheaper price. It states that "We produce the equivalent of almost every well-known and valuable remedy," and gives the following piece of advice to the public: H

> If you want the original advertisement remedies, we can supply them to your order at the full price. If you want Amblin's remedies, order by number or by Amblin's own name.

The next 10 pages of the booklet contain particulars of remedies in parallel columns, two columns on each page. Four of the pages are headed by captions " Order by number," " See what you save," " Saving shillings saves pounds " and " Our prescriptions save you more than half of your money." On each page, the left-hand column is headed " List of advertised patent remedies sold by us," while the right-hand column is headed: " Amblin's Medicine (Brand) Prescriptions." In the left-hand columns are given the names, prices, and (in most cases) the alleged analyses of some 68 patent medicines of well-known brands, most of them being identified by their trade mark, whether registered or not. In some cases the name of the manufacturer or inventor is given, particularly where the description under which the remedy is commonly known comprises such a name—for example, Doan's Backache and Kidney Pills. In the right-hand column there is set out against each remedy mentioned in the left-hand column the name of a remedy sold by the respondents, with its price and (in most cases) its alleged analysis, and the number of the prescription. The names of these remedies of the respondents are in some cases fancy names and in others descriptive names. Where the analysis of a patent medicine and that of the respondents' remedy set against it are both given, they are identical in practically all cases.

The columns are divided horizontally by lines printed across the pages, with the result that each patent medicine, and the respondents' remedy set against it, together form, as it were, a separate group. The last two pages of the booklet contain particulars of a number of remedies described as " Amblin's Special Preparations."

On p. 4 of the booklet, there appears between horizontal lines a group of two remedies. The remedy described in the left-hand column is " Bisurated Magnesia Tablets "—namely, the appellants' preparations of that name. These words are followed by what purports to be the " analysis " of the remedy, and by particulars as to price. The remedy described in the right-hand column is " Bismuthated Magnesia Tablets" —namely, the respondents' preparation of that name. The prescription number is No. 7, which is the same number as that of " Bis Tablets " in the poster. There follows what purports to be the " analysis " of the remedy, which is textually the same as the " analysis " of the Bisurated Magnesia Tablets set out in the left-hand column. Particulars of the price are given, and this is (as in all the other cases in the booklet) substantially lower than that of the corresponding patent medicine. On p. 5 of the booklet, there is another group—namely, " Bisurated Magnesia Powder " and " Bismuthated Magnesia Powder," to which similar observations apply, except that the prescription number of the latter is No. 7a. One other group is worth noticing, for a reason which will appear later. On p. 13 of the booklet, there is a group consisting of " Yeast-Vite Tablets " (without any analysis) in the left-hand column, and " Yeast Life Tablets " (with an analysis) in the right-hand column.

I have set out at some length the salient features of the poster and the booklet, since it is essential to the proper understanding of this case to appreciate exactly what these documents are saying to the public. There can, in my view, be no two opinions about this. They are saying as clearly as anything can be said that, whereas the respondents are prepared to sell the various patent medicines described, they are offering and recommending to the public remedies of precisely the same composition and precisely the same virtues at a lower price. In other words, they are saying that the respondents' remedies are exact equivalents of the corresponding patent medicines, and that they are not merely substitutes, but are substitutes of the same composition and the same efficacy.

If the respondents had confined themselves to statements such as these, without identifying the corresponding patent medicine by means of a registered trade mark in cases where it is sold under such a mark—for example, if they had identified the patent medicine only by the name of the manufacturer—it could not be suggested that the proprietor of such a registered trade mark would have had any ground for complaint. The respondents have not used the registered trade marks of other persons as indicative of the origin of their own goods, and, in default of use of this character, no case of infringement could have been established against them under the law as it stood before the Act of 1938 came into force. It is said on behalf of the appellants, however, that the respondents' use of the appellants' registered trade mark "Bisurated," although not directed to indicate the origin of the respondents' goods, is nevertheless such as to fall within the definition of infringement in sect. 4 of the Act of 1938. This makes it desirable to examine further the implications of what the respondents have done in the poster and the booklet by referring to the appellants' remedies under their registered trade mark. Here again the matter does not seem to me to be open to doubt. The respondents, first of all, are using the word "Bisurated" in a trade-mark sense—that is, as indicative of the origin of the goods in relation to which reference is made to the trade mark. It is true that the reference is not to the respondents' goods, but is to the appellants' goods. Nevertheless, the word "Bisurated" is used in a trade-mark sense, and not in a descriptive sense, as might have been the case if the word had had a descriptive, as well as a distinctive, significance. Moreover, the respondents are using the appellants' trade mark as a convenient method of describing the merits of the respondents' own goods. They are in effect saying: "You, the public, are no doubt familiar with 'Bisurated magnesia,' and are aware of its virtues. The best method of describing the virtues of our 'Bismuthated magnesia' preparations is to tell you that they are precisely the same as those of 'Bisurated magnesia.' That is all that you need know." In short, the respondents are using the appellants' trade mark for the purpose of advertising and compendiously describing the virtues of their own goods, and are thus obtaining for themselves a benefit from the reputation enjoyed by the appellants' goods sold under, and identified by, the appellants' registered trade mark. It is irrelevant to consider this action of the respondents from the point of view of commercial morality. The commercial object of it is manifest. The public who buy branded goods are for the most part ignorant of the names of the manufacturers. It would have profited the respondents little, if anything, to have described the appellants' goods merely by the appellants' own name as manufacturers, without the trade mark, since very few persons would have known what was being referred to. Directly the trade mark is used, all doubts disappear, and the public knows quite well that it is being offered a remedy identical in composition and qualities with the remedy which it knows by the name "Bisurated." It is, therefore, of substantial commercial importance to the respondents to be able to use the appellants' trade mark in the way in which they have in fact used it. To advertise their own goods on their own merits without reference to the trade mark would admittedly have been a far less profitable course. Lastly, the fact must be noticed that in the booklet the appellants' trade mark is used in relation to the appellants' own goods, which the respondents stock and are willing to sell. This use of the mark considered by itself is, of course, unobjectionable. It was argued that this was the only use, but, for the reasons which I have endeavoured to explain, this argument, in my view, cannot be supported.

I now turn to consider the questions of law involved in the appeal. It is beyond dispute that, under the law as it stood before the 1938 Act came into operation, the action of the respondents which I have described would not have amounted to an infringement of the appellants' trade mark. This results from the decision of the House of Lords in *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1), commonly called the *Yeast-Vite* case. In that case, the defendant had exhibited in his shop window placards exhorting the public to purchase his preparations, which he described as substitutes for named patent medicines (including Yeast-Vite) made up to the same formulæ. He also sold bottles labelled: "Yeast Tablets. A substitute for Yeast-Vite." The plaintiffs were the registered proprietors of the trade mark "Yeast-Vite," and they claimed that the defendant's use of that word in the way described amounted to an infringement. This claim was rejected, on the ground that the defendant's use of the mark was not for the purpose of indicating the origin of his goods, and, therefore, did not infringe the right conferred upon the plaintiffs as registered proprietors of the trade mark under the statutes then in force. The ground of the decision is concisely stated in a passage in the opinion of LORD TOMLIN, at p. 110:

> The phrase "the exclusive right to the use of such trade mark" carries in my opinion the implication of use of the mark for the purpose of indicating, in relation to the goods upon or in connection with which the use takes place, the origin of such goods in the user of the mark by virtue of the matters indicated in the definition of trade mark contained in sect. 3.

It will be seen from my analysis of the respondents' use of the appellants' trade mark in the present case that what the respondents have done is in substance precisely the same as what was done by the defendant in the *Yeast-Vite* case (1). The only point of difference between the two cases is that in the present case, in addition to the use by the respondents of the trade mark " Bisurated " for the purpose of compendiously describing the merits of their own preparation (which is the use complained of), there is the further use of the trade mark—admittedly innocent—in relation to the actual goods of the appellants. These two uses are quite distinct. The existence of the latter cannot nullify the existence of the former, and an appreciation of this fact is essential to a proper understanding of this case.

It is clear at the outset that, if the Act of 1938 has had the effect of making the use now complained of an infringement, a radical alteration has been effected in the law relating to registered trade marks. That law is wholly statutory, and is a development of the common law relating to passing off, which was based on deceptive use. An infringement of a registered trade mark could take place only if the trade mark was used to indicate the origin of the infringer's goods, such a use being of necessity deceptive. In the use now complained of, nothing of the kind is to be found. It is not deceptive in any sense. The goods of the appellants are quite clearly distinguished from those of the respondents. That, indeed, is the whole sense of the documents to which I have referred. The right now claimed, if it exists, is, therefore, an entirely new departure in the law of registered trade marks. It confers upon the proprietor a novel type of monopoly, for which no consideration is given to the public —as it is in the case of patents—beyond the fees payable on registration. It gives to the proprietor of a registered trade mark a privilege in which the proprietor of an unregistered mark does not share, and prohibits for his benefit a form of trading which had previously been considered unobjectionable, and is still unobjectionable except in the one case where a registered trade mark is in question.

While recognising the fundamental nature of the change in the law which the appellants claim to have been made, I do not find it useful to consider how such a remarkable piece of legislation can have eluded the vigilance of Parliament. My sole task is to construe the language which the legislature has used, and, although in a doubtful case the fact that the alleged change in the law would be far-reaching, and, indeed, revolutionary, may tip the scale, considerations of this kind cannot be allowed to prevail where the language, when analysed and construed, is shown to lead to such a result. Nor must the fact that the language used is crabbed and involved deter the court from endeavouring to discover its meaning. Every Act of Parliament must be approached with the conviction that its language is capable of a reasonable construction when carefully examined, and, when that language appears in an amending Act, and is quite clearly directed to altering the law, it is a policy of despair to say that the language used is so obscure that the law must be said to remain unaffected by it. The present Act must, as I have said, be construed as an amending Act. I am unable to approach its construction with any preconceived ideas as to the extent of the amendments intended to be made. An extension of the rights conferred by registration of a trade mark is properly described as an amendment of the law relating to trade marks. How far that extension goes is to be discovered from the language in which the legislature has expressed its will, and not otherwise.

In sect. 39 of the Act of 1905, the right conferred upon the proprietor of a registered trade mark is stated to be :

> . . . the exclusive right to the use of such trade mark upon or in connection with the goods in respect of which it is registered . . .

If, therefore, A was the registered proprietor of a trade mark for " chemical substances prepared for use in medicine and pharmacy " (Class 3), B could not use that trade mark upon, or in connection with, substances of this character manufactured by B. By this was meant, as appears from the *Yeast-Vite* case (1), that, before a use by B of the trade mark in relation to his own goods could amount to an infringement, it must be shown that such use was for the purpose of indicating the origin of these very goods in the user of the mark—that is, B. In the *Yeast-Vite* case (1), the defendant's use, I should have thought, was clearly a use " in relation to " the defendant's own goods, according to the ordinary meaning of that phrase apart from any special context—a meaning which appears to have commended itself to LORD TOMLIN in the passage from his opinion quoted above. The plaintiff failed because the defendant's use of the mark, although it was a use in relation to the defendant's own goods, was not for the purpose of indicating the origin of those goods in the user of the mark—that is, the defendant.

The definition of the right of the proprietor of a registered trade mark contained in sect. 4 of the Act of 1938 is quite different in language. The 24 words which I have quoted from section 39 of the Act of 1905 are replaced by the 255 words of subsect. (1), if my addition is correct. Even this figure is vastly exceeded if the other subsections, which consist largely of definition, are included. So formidable an alteration may legitimately be supposed to have been intended by the legislature to produce some concrete result. The definition in subsect. (1) falls into two parts. The first part gives a general definition of the exclusive right of the proprietor, and the second part gives two special instances " without prejudice to the generality of the foregoing words " in which the right is to be deemed to be infringed. The first part of the definition is as follows :

> . . . the exclusive right to the use of the trade mark in relation to those goods . . .

By sect. 68 (2), this reference to use in relation to goods is to be construed as a reference to use " upon or in physical or other relation to goods." If this had been the only alteration effected by the Act of 1938, I could have understood an argument to the effect that the law as laid down in

the *Yeast-Vite* case (1) remained unaffected in spite of the change in phraseology, and in spite of the wide meaning given to the phrase "in relation to." However, as will be seen, there are provisions in the second part of the definition which are most relevant to the construction of the first part, and which, in my opinion, render it impossible to treat the language of the first part as identical in effect with that used in the A
earlier Act.

The second part of the definition gives two particular cases of use "in relation to" goods which are to be deemed to be infringements. Such use will be an infringement if it takes place:

> . . in such manner as to render the use of the mark likely to be taken either (*a*) as . B
> being use as a trade mark; or (*b*) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

The use mentioned under head (*a*) is quite clearly a use by the alleged C
infringer in relation to his own goods which is likely to be taken as being use as a trade mark for his own goods—that is, to use the words of LORD TOMLIN, "as indicating in relation to [those goods] the origin of [them] in the user of the mark [the alleged infringer]." This, therefore, is the old type of infringement. The use mentioned under head (*b*), however, D
is altogether different. It is expressed in the alternative, and it would not be in accordance with any rule of construction to attribute to the language of head (*b*) a meaning identical with that of head (*a*). In my opinion, it is clear that head (*b*) is intended to deal with a class of use which is not already covered by head (*a*), and, as head (*a*) completely E
covers what I have called the old type of infringement, it follows that head (*b*) must be dealing with a type of use which is not a use indicating the origin of the goods in the infringer. Moreover, as this type of use is a use "in relation to" the goods of the infringer, it follows that the words "use in relation to" in both parts of the definition cannot be F
confined to a use in relation to those goods for the purpose of indicating their origin in the infringer. Once it appears that there may be a wrongful use of a trade mark "in relation to goods"—that is, the goods of the alleged infringer—which is not a use as a trade mark in reference to those goods—that is, as indicating the origin of those goods in the G
alleged infringer—all reason for giving a limited construction to the words "in relation to" disappears. I have already expressed the view that, according to the ordinary meaning of the words, apart from any special context, the respondents' use of the trade mark "Bisurated" which is complained of is a use "in relation to" the respondents' own H
goods. It is for the purpose of describing the virtues of those goods that the mark is used. The public is invited to compare "Bisurated" goods with "Bismuthated" goods, and is told that the latter are identical with the former save in the matter of price.

I am of opinion, therefore, that the respondents have infringed the exclusive right of the appellants as defined in the first part of sect. 4 (1). However, they have also, in my judgment, been guilty of infringement under para. (*b*) of the second part of the subsection. The language of that paragraph is turgid and diffuse, but a patient examination makes it possible to discover its meaning. In order to bring himself within A this paragraph, there must be a use of:

> . . . a mark [not a trade mark] identical with [the registered trade mark] or so nearly resembling it as to be likely to deceive or cause confusion . . .

The respondents have used the mark "Bisurated" in two ways, one a legitimate way as the trade mark of the appellants' goods, the other B (with which we are now concerned) as a mark forming by reference part of the description of their own goods. Next, the use must be in the course of trade. This condition is satisfied. Next, the use must be "in relation to any goods in respect of which it is registered." The use complained of is in relation to the identical class of goods. Next, the C use must be:

> . . . upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public . . .

This excludes all other forms of relationship covered by the definition D of "in relation to" contained in sect. 68 (2). This condition has been complied with. Next, the mark must be used:

> . . . in such manner as to render the use of the mark likely to be taken either . . . (*b*) as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

E The persons having the right as proprietors to use the trade mark "Bisurated" are the appellants. "Bisurated" goods are goods with which the appellants are connected in the course of trade. Does the use complained of import a reference to the appellants' "Bisurated" goods? Manifestly, since it is the whole object of that use that it F should do so.

The language which I have just quoted is far from happy. In substance, what is meant, as it appears to me, is that the mark must be used in what I may call a trade-mark sense, not, of course, as a trade mark for the infringer's own goods (that is provided for by para. (*a*)), G but as a trade mark identifying the complainant's goods, as the trade mark "Yeast-Vite" was used in the *Yeast-Vite* case (1), and as the trade mark "Bisurated" is used in the present case. The reason why it is only used in a trade-mark sense which falls under para. (*b*) is, I think, fairly obvious. The use must be use of a "mark," and a mark is H defined in sect. 68 (1) as including, among other things, a "word." If para. (*b*) had not been confined to the use of a mark in a trade-mark sense, it might well have followed that the use in a non-trade-mark sense of a word which happened to be a trade mark would have been an infringement. Thus, let it be supposed that a shoe manufacturer had succeeded in registering the word "crocodile" as a trade mark. It might have been said that another manufacturer would have been unable to describe his shoes as " made of crocodile " skin. Under para. (*b*) as it stands, such a description would be unobjectionable. If, however, he went on to say that his shoes were as good as the " Crocodile " brand shoes, he would be using the word " crocodile " in a different sense—namely, a trade-mark sense, and not a merely descriptive one. A similar example suggests itself in reference to the well-known " Sheen " mark for sewing cotton: *Re Coats (J. & P.), Ltd.'s Application* (2).

Another argument was founded upon the language of sect. 4 (3) (*a*), which provides that certain acts shall not be deemed to be infringements. It was said that, even if the language of sect. 4 (1) is wide enough in itself to cover what the respondents have done, it is counteracted by subsect. (3) (*a*), in that the use which the respondents have made of the appellants' mark is the use permitted by that paragraph. This argument, in my opinion, is founded on a fallacy. Para. (*a*) is a verbose piece of drafting, but its effect, shortly stated, appears to me to be to exclude from the category of infringing acts what would otherwise have fallen within the wide scope of subsect. (1)—namely, the use of a trade mark upon the goods of the proprietor with his consent, express or implied. The scheme of sect. 4, as a matter of drafting, is, I think, clearly to include within the scope of subsect. (1) every use of a mark, and then to exclude from its operation by the following subsections various types of use, including the everyday type of use described in para. (*a*). There is no question that the respondents have used the appellants' trade mark in the way described in para. (*a*), for they sell the appellants' goods upon which the trade mark " Bisurated " has been placed by the appellants themselves. However, as I have already pointed out, this is only one use which the respondents have made of the appellants' mark, and no complaint is, or could be, made with regard to it. The other use which the respondents have made of the mark is entirely different in character and purpose. The fact that the one use is rendered legitimate by subsect. (3) (*a*) cannot possibly be treated as a justification for the other.

One last argument may be mentioned. It was said on behalf of the respondents that, if the appellants are right, traders would find their activities outrageously circumscribed. For example, it was said that they could not advertise in one and the same catalogue, or display in one and the same shop window, both their own goods and branded goods of similar qualities. This argument does not alarm me. Whether or not a particular use of the complainant's trade mark is a use " in relation to " the alleged infringer's goods within the meaning of the subsection must depend, in my view, upon the facts of each individual case. In the present case, the facts which I have analysed in the earlier part of this judgment present no difficulty to my mind.

I conclude, therefore, that the effect of this legislation is to alter the law as laid down in the *Yeast-Vite* case (1), and to make what the respondents have done an infringement. It is interesting to observe that the first part of this conclusion agrees with the view taken by the respondents themselves, and, I dare say, by traders in general. In their poster, they say:

> . . . the millionaire patent medicine firms have secretly got an Act passed which A makes it illegal for us to mention the names of patent medicines in comparison with our copies so that we cannot say for instance: "30 tablets Amblo 6*d*. sold to compete with 10 tablets so-and-so at 6*d*."

They then proceed to state that they have found a "simple way" of showing the comparison. Unfortunately for them, this "simple way" B has not enabled them to circumvent the statute. I do not add to the length of this judgment by examining in detail the reasoning of SIMONDS, J., from whom, with all respect, I am differing. My reasons for disagreeing with the view which he took are sufficiently apparent, I hope, from what I have said. In my judgment, the appeal should be C allowed.

MACKINNON, L.J.: The plaintiffs are the makers and proprietors of a medical preparation which they call Bisurated magnesia. The defendants are dealers in, and manufacturers of, various medicinal D preparations. The defendants issued a pamphlet to the public. In this pamphlet, they point out that, as very large sums are spent in advertising proprietary medicines, the price charged for them has to be much in excess of a reasonable profit upon the cost of their materials. The pamphlet goes on to state that the defendants are ready to supply any E of these proprietary brands at the prices fixed by their proprietors. However, having specified the chemical analysis of each of these, the defendants go on to offer to supply a product of their own, of the same analysis, at a much cheaper price. Thus, as regards the plaintiffs' product "Bisurated magnesia tablets," they offer to sell the plaintiffs' product F at their own price—namely, at 1*s*. 3*d*. for about 50 tablets. They state the analysis under four heads. Opposite to this offer of the plaintiffs' tablets, there is printed: "Prescription No. 7, bismuthated magnesia tablets." The analysis is given, and is identical with the former one. These bismuthated magnesia tablets the defendants offer G to sell at the price of 6*d*. for 30 tablets, or 1*s*. for 75 tablets. This is obviously a display of sharp business competition by the defendants. When I say sharp, I do not mean to suggest impropriety, underhandedness, or any sort of immorality. I am concerned with a question of law, and the moral aspect of the activities of either the plaintiffs or the H defendants is quite irrelevant.

The plaintiffs allege that what the defendants have done in issuing this pamphlet is more than the exercise of keen competition in business. They say that it constitutes an infringement of their legal right, and that the defendants can be restrained from such infringement and are liable in damages for it. The plaintiffs do not suggest that, on the facts which I have so far stated, the defendants have infringed any of their legal rights existing at common law or in equity. There is, however, one further fact to be stated. The word "Bisurated," besides being part of the name applied by the plaintiffs to their product, was registered by the plaintiffs in 1912 as a trade mark under the Trade Marks Act, 1905. It is because of this further fact that the plaintiffs allege that they possess the legal right which I have specified.

The plaintiffs agree that under the Trade Marks Acts as they existed before 1938—that is, those of 1905 and 1919—this legal right did not exist. Such an admission is clearly necessitated by the decision of the House of Lords in *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1). The plaintiffs contend, however, that they have been clothed with a newly-created legal right by virtue of the provisions of the Act of 1938, which is entitled :

> An Act to consolidate the Trade Marks Act, 1905, the Trade Marks Act, 1919, and the Trade Marks (Amendment) Act, 1937.

This novel legal right, they say, has been conferred upon them by sect. 4 of the Act of 1938, and that section, they say, has overruled the decision in *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1). Our task, therefore, has been solely to examine, with laborious iteration, the language of this Act of 1938 and, in particular, of sect. 4.

Before I proceed to that examination, I may perhaps be permitted to point out that the Act of 1938 purports to be, and is, a consolidation Act. So far as the Acts of 1905 and 1919 were amended, that was done by the Trade Marks (Amendment) Act, 1937. By the combined effect of sect. 33 (5) of the Act of 1937 and sect. 71 (2) of the Act of 1938, the Act of 1937 has never had any effective existence at all. This new legal right, consequent on the registration of the trade mark "Bisurated," is said to have been conferred upon the plaintiffs by sect. 4 of the Act of 1938. That section seems to be primarily in substitution for sect. 39 of the Act of 1905, and in the course of this case, I have heard it read many times, but, despite this iteration, I must confess that, reading it through once again, I have very little notion of what the section is intended to convey, and particularly the sentence of 253 words, as I make them, which constitutes subsect. (1). I doubt if the entire statute book could be successfully searched for a sentence of equal length which is of more fuliginous obscurity.

It is an elementary rule of the construction of statutes that one should presume, as stated in MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., p. 73 :

> . . . that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication . . . It is in the last degree improbable that the legislature would . . . infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness . . .

It is manifest that the plaintiffs cannot say that the legislature has created the new legal right they claim and has overruled the *Yeast-Vite* case (1) explicitly, in clear terms or by clear implication, still less that it has done so " with irresistible clearness."

I have said that the repeated perusal of sect. 4 (1) leaves me without any clear notion of its meaning and effect. Some glimmer of illumination appears to be provided by subsect. (3) (*a*). The qualification, or limitation, of the effect of subsect. (1) there expressed would appear to suggest that, if subsect. (1) stood alone, it would be an offence if any human being other than the registered proprietor of a trade mark ever bought or sold, or even had in his possession, goods to which that proprietor had affixed the mark. I confess that I should never have dreamed that subsect. (1) could have this astonishing effect, nor do I believe it ever could, but the fact that the draftsman thought it necessary to guard against such a supposition seems to be a signal proof of his success in making a masterpiece of obscurity in his subsect. (1).

As I have said, sect. 4 of the 1938 Act takes the place of sect. 39 of the Act of 1905. One alteration of language, to which the argument for the plaintiffs attached immense importance, is the substitution of the words " in relation to those goods " for the former words " upon or in connection with the goods." To quote again from MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., p. 278:

> Where a limited interpretation has been placed upon prior Acts of Parliament and the words of an amending Act have been enlarged, the inference is that the enlargement must have been intentional on the part of the legislature.

However, I confess that I can see no enlargement, or any essential change of intention, in the substitution of the words " in relation to " for the words " in connection with." The omission of the words " upon the goods " is no doubt a real alteration, but I see no real difference between " in relation to " and " in connection with." The draftsman of this 1938 Act appears to have a liking for the phrase " in relation to." He uses it elsewhere when I think he might just as well have said " in connection with." For example, he uses it twice in sect. 68 (1) in the definition of " limitations," once in the definition of " prescribed," and three times in the definition of " trade mark," while in sect. 68 (2) he uses the phrase twice, enlarging it the second time to " in physical or other relation to."

The appellants contend that this sect. 4 of the 1938 Act has altered the law as it existed under the 1905 Act as interpreted by the House of Lords in the *Yeast-Vite* case (1), and they are bold enough, or are constrained, to assert that it was the intention of the legislature to effect this alteration. I have already suggested that, if it is contended that a statute has altered the law, those who make the assertion should be able to point to clear language which achieves that result. It is also desirable, I think, to recall the four leading rules for the construction of statutes which were enunciated by SIR EDWARD COKE—namely, (i) what was the law before, (ii) what was the mischief or defect for which the law had not provided, (iii) what remedy has Parliament appointed, and (iv) the reason for the remedy.

In earlier days, when the conciseness of substantive enactment made such an addition practicable, the second and fourth of these questions were commonly answered by a preamble. If the appellants are right in their contention that, by this sect. 4, the law has been altered and the *Yeast-Vite* case (1) overruled, what would have been the preamble specifying the mischief or defect in the law which it was desirable to A remedy? For my part, I am unable to imagine its terms, but I can conceive a more cynical person suggesting this: "Whereas the business of the proprietors of quack medicines in fleecing the public has been unduly hampered by the decision in the *Yeast-Vite* case (1), and whereas it is in the national interest that this obstacle shall be removed . . ." B

The appellants have failed to satisfy me that the language of dark and tortuous prolixity in this sect. 4 makes that which the respondents did in issuing their pamphlet a breach of a newly-created legal right of the appellants. I should wish to dismiss this appeal, in agreement with the decision of SIMONDS, J., but differing, unhappily, from my brethren. C Ultimately, I believe, the difference between us is largely one of fact. Whatever the meaning of sect. 4, the offence committed by one who infringes the rights of the proprietor of a registered trade mark must surely be his use of that trade mark "in connection with" or "in relation to" his (the alleged infringer's) goods. I cannot see that in the pamphlet D the defendants can be said to use the word "Bisurated" "in relation to" their (the defendants') goods. They do use the word "Bisurated" in relation to the plaintiffs' goods, which they offer to sell. They go on to say that they have goods of their own which they are willing to sell, but these goods, so far as they use any word or adjective "in relation to" E them, are described as "bismuthated tablets." Put in another way, this means that, so far as, in their pamphlet, the defendants have used the word "Bisurated" "in relation to" any goods, they have done so in relation to the goods of the plaintiffs, and in relation to no other goods, which, notwithstanding anything which can possibly be meant F by sect. 4 (1), (2), is a thing permitted to the defendants by subsect. (3) (*a*). LORD CAMPBELL, in his LIVES OF THE CHANCELLORS, Ch. 15, speaking of the practice in the reign of Edward III, says that in 1366 THORPE, C.J., and one of his puisnes:

> . . . went to the House of Lords . . . and asked them, as they had passed a Statute G of Jeofails, what they intended thereby. Such questions, which were frequent in this reign, must have been answered by the chancellor.

If this practice were revived, the Lord Chancellor might have a crowded daily levee of inquiring judges. As it is, perhaps an appeal by the present respondents may elicit from the House of Lords "what they intended" H by sect. 4 of this Act of 1938.

CLAUSON, L.J.: The plaintiffs and the defendants are competitors in the business of dealing in "chemical substances prepared for use in medicine or pharmacy." The plaintiffs are registered owners of a Trade

Mark No. 561,459, consisting of the word "Bisurated," registered in 1935 in respect of that class of substances. They are also registered owners of a precisely similar trade mark, No. 340,411, registered in 1912 in respect of "a medicinal stomachic powder for human use." It was not suggested before this court that their rights in respect of these two trade marks were to be differentiated for the purposes of the present case. For the sake of clarity, I propose, however, to deal with the matter as though the only relevant trade mark were No. 561,459, registered in 1935 in respect of "chemical substances prepared for use in medicine or pharmacy."

In the present action, the plaintiffs claimed relief against infringement of trade mark and passing off. SIMONDS, J., granted an injunction in respect of passing off. Against that part of the order there is no appeal. He refused an injunction in respect of infringement, however, and this appeal is concerned solely with the question whether he was right in this refusal. The infringement complained of consisted of the issue by the defendants to the public of certain advertising matter. The contents of the documents are stated in detail in the judge's judgment, and I do not propose to repeat them. The judge sums up the contents as follows, at p. 158:

> It will be noted that the defendants do not by any means seek to describe goods of their own manufacture by the plaintiffs' mark. On the contrary, they emphasise the distinction between their own and the plaintiffs' goods, saying in effect to the public: "You can have the plaintiffs' goods or ours. Ours are just the same as theirs, and are much cheaper."

I adopt this summary of the advertisement as correct, adding, however, that in the advertisement the defendants in the course of trade (i) refer to chemical substances prepared for use in medicine and pharmacy, and compare some of such substances—namely, those made by the plaintiffs—with others of such substances—namely, those made by the defendants—and (ii) use, for the purpose of making this comparison, and in relation to chemical substances prepared for use in medicine and pharmacy, the word "Bisurated" as importing a reference to goods marketed by the plaintiffs, or, in other words, to goods with which the plaintiffs are connected in the course of trade.

It is not suggested that this claim for infringement could have been sustained before the coming into operation of those sections of the Trade Marks Act, 1938, which reproduce the Trade Marks (Amendment) Act, 1937. Before that date, it is by no means clear—on this point, however see *Jay* v. *Ladler* (3)—that the use of the plaintiffs' trade mark in an advertisement issued by the defendants could have amounted to infringement, but, whether or not that would have been so, it is clear, having regard to the language used in the Trade Marks Act, 1905, s. 39, and to the decision of the House of Lords in *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1), that before that date there could be no infringement unless the use of the mark by the defendants indicated that the origin of the goods upon or in connection with which it was used was in the infringer.

The question before SIMONDS, J., and this court is whether, on the true construction of the new legislation, and in particular sect. 4 of the Act of 1938, the law has been changed so as to extend infringement to cover such a case as the present.

Before I deal with sect. 4, it may be useful to observe that in the new legislation the phrase "trade mark" is given a new definition. That phrase is defined in the earlier legislation (omitting words which may for the present purpose be treated as irrelevant) as follows:

> . . . a mark used . . . upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection . . . dealing with, or offering for sale . . .

In the new legislation, the phrase is defined (with like omissions) as:

> . . . a mark used . . . in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right . . . as proprietor . . . to use the mark . . .

That definition, as I read it, still treats a trade mark as something which indicates origin, but, whereas the old definition contemplates that the trade mark is to be used upon or in connection with goods as an indication of origin, the new definition contemplates that the trade mark may be used, not only upon or in connection with goods, but "in relation to goods." The old phrase "in connection with goods" seems *prima facie* to be intended to deal with the case where, for physical reasons, the mark cannot be impressed on the goods, but is used in such connection as—for example, by impression on a container, or in some similar way—to manifest that the mark is used as an indication of the origin of the particular physical object in connection with which the mark is used. The phrase "in relation to" would seem to be used in order to cover the case of the use of a mark in an advertisement where there is no impression of the mark on an object, nor such a connection as, in view of physical facts, is a near substitute for such an impression, and the mark is used to indicate the origin, not of a specific physical object offered for sale, but of the goods advertised—that is, of the products, whether or not at the moment in physical existence, which have, or will have, their origin in the owner of the mark. In view of the use of this phrase "in relation to" in sect. 4 of the Act of 1938, on which this case turns, the change in the language used to define a trade mark is, in my view, not unimportant.

Turning now to sect. 4, it is convenient in the first place to consider subsect. (1) in isolation from the remaining subsections of sect. 4. The first words which fall to be construed are "use of the trade mark in relation to" goods in respect of which the trade mark is registered. SIMONDS, J., takes the view that the phrase "in relation to" has the same meaning as that of the words "upon or in connection with" in sect. 39 of the Act of 1905. Here I must part company with him. The words "in relation to" seem to have been deliberately used by the legislature in place of the words "upon or in connection with." If my observations on the phrase "in relation to" as it occurs in the new definition of "trade mark" are correct, the first seven lines of subsect. (1) would appear to confer on the registered owner of a trade mark, not only a monopoly in the word composing the trade mark where that word is used "upon or in connection with" a specific physical object, A but also a monopoly of the use of that word where it appears, divorced altogether from any connection with a specific physical object, in an advertisement which mentions the products of the owner of the mark. It is important in this connection to form a clear view of the meaning of the words "any goods" in the fifth line, and of the words "those B goods" in the seventh line, of the section. In my judgment, the words "any goods" in the fifth line, and consequently the words "those goods" in the seventh line, mean "goods of the class in respect of which the trade mark is registered." Thus, taking the facts of the present case and applying the words of the first seven lines of sect. 4 to those facts, C the enactment reads as follows: "The registration of the plaintiffs as proprietors of the trade mark 'Bisurated' in respect of 'chemical substances prepared for use in medicine and pharmacy' gives them the exclusive right to use the word 'Bisurated' in relation to 'chemical substances prepared for use in medicine and pharmacy.'" If the section D had stopped at this point, it may be that there would still be a point open for argument. It may be that it could have been contended, as, indeed, it was strenuously contended, as well before SIMONDS, J., as in this court, that this exclusive right must be treated, not as a monopoly of the use of a particular word in the English language, but as a monopoly E of the use of the word only as indicating the origin of goods in the person using the word. However, a consideration of the rest of the subsection appears to me to make it clear that this contention is erroneous. The words from line 7 to the end of the section show that the legislature intends to provide that the monopoly is infringed by the use of the F word in the course of trade, not only (para. (*a*)) where the word is being used as a trade mark—that is, as I understand it, as an indication of origin of specific goods in the person who uses the word—but also in another case which is set out in para. (*b*). The material words of the section in the case covered by para. (*b*), as applied to the facts of the G present case, are as follow:

> . . . the plaintiffs' rights are infringed by the defendants if the defendants use the word "Bisurated" in the course of trade in an advertisement in relation to any chemical substances prepared for use in medicine or pharmacy in such a manner as to render the use of the word "Bisurated" as likely to be taken as referring to the plaintiffs or to the plaintiffs' goods.

H So far, I have dealt with sect. 4 (1) in isolation, but it is necessary to go on to consider subsect. (3), which enacts that, in certain circumstances, that which is there indicated is not to be treated as an infringement. Again I will take the material words and apply them to the facts of the present case. The effect of subsect. (3) in regard to the present case appears to me to be to provide that the monopoly in the use of the word " Bisurated " given to the plaintiffs by subsect. (1) is not infringed by the use of the mark by the defendants in relation to goods of the plaintiffs to which the plaintiffs have applied the mark—that is to say, to specific articles which have been so treated. Subsect. (3) (*a*) does not seem to me to deal with anything but the user of a trade mark in relation to specific existing goods to which the trade mark has been applied.

I now turn back to the impugned advertisements. It is quite clear, as SIMONDS, J., pointed out, that in them the word " Bisurated " is not used as indicating origin of any goods in the defendants, and, accordingly, had the old law applied, the plaintiffs would necessarily fail. Further, it is clear, I venture to think, and, indeed, this is merely a statement of the same proposition in other words, that the word " Bisurated " is not used by the defendants in the advertisements as a trade mark—that is to say, as indicating origin in the defendants of the goods mentioned—and, accordingly, that the case is not covered by sect. 4 (1) (*a*). The question is, however, whether the case is covered by sect. 4 (1) (*b*). If my preceding observations are accurate, it follows that the case is so covered, and that, unless something to protect the defendants is to be found elsewhere in the Act, the plaintiffs must succeed. It is true that the effect of the construction thus placed on the subsection is to confer on the plaintiffs a right crucially different in principle from the rights theretofore enjoyed by the owners of trade marks. It is to be observed, however, that, if the legislature thought that the plaintiffs in *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (1) had a real grievance against the defendants in that case, and if they desired to remedy that grievance, they have, on the construction placed by me on this subsection, effectually remedied it.

It remains necessary, however, to deal further with sect. 4 (3) (*a*). I will not repeat my observations on that subsection. It may be—and, indeed, was, as I understood—suggested that the advertisements are protected by this subsection because, on their true construction, they merely refer to specific goods of the plaintiffs stocked, and offered for sale, by the defendants. Such a reference, it is said, is specifically permitted by the section. " What is wrong," it may be asked, " in referring by the trade mark to the goods on which the plaintiffs have put the mark, which goods we have bought from them, and are by our advertisements offering to sell to the public ? " I cannot help thinking that it was on this argument that, commercially speaking, the defendants pinned their hopes when they drafted the impugned advertisements. In my view, the answer to this argument is to be found in the terms of the advertisements as properly construed. It is perfectly true that in the advertisements the defendants use the word " Bisurated " in relation to specific goods of the plaintiffs to which the plaintiffs have applied the trade mark, and, in regard to that part of the advertisements, it may well be the fact that no infringement has been committed. On a careful consideration of the terms of the advertisements, however, it becomes plain, in my judgment, that, while it may well be that the advertisements contain a genuine offer of the plaintiffs' goods under the plaintiffs' mark, and that so far there is no infringement, the defendants in the advertisements go beyond that, and proceed to make a further statement in terms which are plainly to be gathered from a comparison between the prefatory matter and the tabulated list, and may well be gathered from the mere arrangement of the tabulated list of medicines in parallel columns. That statement is that the defendants' bismuthated magnesia tablets are the equivalent of, and cheaper than, something which the defendants describe by the use of the word "Bisurated." I can see no escape from the conclusion that that is a separate statement in which the defendants use the word "Bisurated" as importing a reference to the plaintiffs' Bisurated tablets generally, and not merely to the specific articles existing in the defendants' stock, and that the user of the word "Bisurated" is other than, and goes beyond, a mere user of the word in relation to specific existing goods on which the plaintiffs have placed their mark.

I thus reach the conclusion that, as the law now stands, the plaintiffs are entitled to succeed in their claim for an injunction to restrain infringement of their trade mark "Bisurated." As I have already explained, I have dealt specifically only with the mark registered in 1935, but I can see no distinction between the rights arising from the registration of that mark and those arising from the registration of the earlier mark. In my judgment, the plaintiffs are entitled to a reversal of the refusal of the judge to grant them an injunction against infringement, and are entitled to obtain from this court the usual order restraining infringement of their marks.

Appeal allowed with costs in both courts. Injunction granted. Leave to appeal to the House of Lords.

Solicitors: *McKenna & Co.* (for the appellants); *Edward Davis, Nelson & Co.* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

KERR *v.* JOHN MOTTRAM, LIMITED.

[CHANCERY DIVISION (Simonds, J.), **May 7, 1940.**]

Companies—Minute book—Minutes to be conclusive evidence of facts therein stated—Evidence tending to disprove such facts—Evidence inadmissible—Companies Act, 1929 (*c.* 23), *s.* 117 (3).

Where the articles of association of a limited company provide that the minutes made at the general meeting "shall be conclusive evidence without any further proof of the facts therein stated," and the minute book and signatures attached thereto are proved, then, in the absence of fraud on the part of the company's officers, it is not open to a party to adduce evidence tending to prove facts inconsistent with those recorded in the minute book.

[**EDITORIAL NOTE.** By the Companies Act, 1929, s. 120, the minutes of meetings of the company or of the directors are in effect made *prima facie* evidence of the proceedings. In the present case, the articles of association provided that the minutes should be conclusive evidence of the proceedings, and it is held that the evidence of the minutes can only be rebutted by showing that they were fraudulently compiled.

As to Minutes of Meetings, see HALSBURY, Hailsham Edn., Vol. 5, pp. 339, 340, para. 559; and for Cases, see DIGEST, Vol. 9, pp. 581, 582, Nos. 3883-3895.]

Cases referred to:

(1) *Re Hadleigh Castle Gold Mines, Ltd.*, [1900] 2 Ch. 419; 9 Digest 571, *3794*; 69 L.J.Ch. 631; 83 L.T. 400.

(2) *Arnot* v. *United African Lands, Ltd.*, [1901] 1 Ch. 518; 9 Digest 571, *3795*; 70 L.J.Ch. 306; 84 L.T. 309.

Action for specific performance of a contract of sale of certain shares in the defendant company. The preliminary point was taken that the plaintiff was not entitled to adduce evidence tending to disprove facts stated in the minute book of the company, on the ground that, according to the articles of association, the minute book was to be conclusive evidence of the facts therein stated.

A. Grant, K.C., and *R. J. T. Gibson* for the plaintiff.

J. Norman Daynes, K.C., and *D. Cohen* for the defendants.

Simonds, J.: This action raises a curious point upon which, I am told, there is no previous decision. The plaintiff, Ewen Mackinnon Kerr, sues a limited company, John Mottram, Ltd., claiming specific performance of a contract for the sale to him by the company of certain preference shares and ordinary shares of the company, which it was in a position to sell by virtue of a lien given to it by the articles of association. For the purpose of establishing that contract, he has to lead evidence to show that such a contract was in fact entered into without any qualification, and, in order to lead that evidence, he has to displace the record in the minutes of the company of what took place. When counsel for the plaintiff sought to lead such evidence, objection was taken by counsel for the defendant company that he was not entitled to do so, inasmuch as the evidence which he proposed to lead was inconsistent with what was recorded in the minutes of the company. In support of that contention he relied upon art. 114 of the articles of association of the company, which provides as follows:

> The directors shall cause proper minutes to be made of all general meetings of the company and also of all appointments of officers, and of the proceedings of all meetings of directors and committees, and of the attendances thereat, and all business transacted at such meetings, and any such minute of any meeting, if purporting to be signed by the chairman of such meeting, or by the chairman of the next succeeding meeting, shall be conclusive evidence without any further proof of the facts therein stated.

In order to support his objection to the evidence proposed to be led by the plaintiff, the defendants had to prove the minute book, and had to prove that the signature to the minutes of Feb. 7, 1939, which were the minutes in question, was the signature of the chairman. They accordingly called the secretary of the company, who was also a director, to prove that this was the minute book of the company, that the minutes were the minutes of the meeting in question, and that the signature was that of the chairman of the meeting. That gave counsel for the plaintiff the opportunity of establishing, if he could, that the minutes were not a *bona fide* record of what took place, and that they had been A falsely and fraudulently written up after the events, with a view to setting up a story which was not in accordance with the facts. I am quite satisfied, after hearing the evidence of the secretary, that that minute is correct. I am satisfied that this was a *bona fide* record of what took place on Feb 7, 1939. I am not saying that it is in every respect an B accurate report. That I do not know, but I am satisfied that it is not a fraudulent report, and not written up. Accordingly, I have to examine, without considering the element of fraud, whether the objection taken by counsel for the defendants to the leading of the suggested evidence is sustainable.

C Article 114 represents the agreement between the shareholders as to what is to be, as between them, the value and effect of the minutes of the company as recorded in its minute book and signed by the chairman, and their bargain is that it is to be :

> . . . conclusive evidence without any further proof of the facts therein stated.

D I have no doubt that the words " conclusive evidence " mean what they say—namely, that they are to be a bar to any evidence being tendered to show that the statements in the minutes are not true. The words " conclusive evidence " which appear in this article are the words which appear also in the Companies Act, 1929, s. 117 (3), which provides as E follows :

> At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

F Those words, which appear in the sections which were the predecessors of that section, have been interpreted by the court, first, in *Re Hadleigh Castle Gold Mines, Ltd.* (1), and again by the Court of Appeal in *Arnot* v. *United African Lands, Ltd.* (2), and from those decisions it is clear that the words as they are used are to bear their natural meaning. That is G to say, they are to be regarded as evidence which is not to be displaced, and evidence which is conclusive as between the parties who are bound by the minutes. If that is so, that is an end of the plaintiff's case, because it is clear, upon a reading of the minutes, that no contract such as the plaintiff seeks to establish was entered into on Feb. 7, 1939.

H *Action dismissed with costs.*

Solicitors : *Lovell, White & King*, agents for *Pickering & Pickering*, Stafford (for the plaintiff) ; *Gibson & Weldon*, agents for *Hand, Morgan & Co.*, Stafford (for the defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

Re JESTY'S AVENUE, BROADWAY, WEYMOUTH.

[King's Bench Division (Hawke, Charles and Hilbery, JJ.), **April 16, 17, 1940.**]

Highways—Streets—Lowering gas main—Alteration to existing sewage system—Whether chargeable to frontagers or to ratepayers—Public Health Act, 1875 (*c.* 55), *s.* 153—*Private Street Works Act,* 1892 (*c.* 57), *s.* 6.

A local authority purported to pass a resolution under the Private Street Works Act, 1892, s. 6, to sewer, level, metal, flag, channel and make good a street, and included in the provisional apportionment of expenses was an amount of £162 17*s.* 9*d.*, being the cost of lowering a gas main already under the street, and an amount of £119, being the cost of providing new water gulleys, providing and placing concrete over an old sewer in the street, and making manholes in the sewer. It was sought to charge both these amounts to the frontagers. The old sewer had been laid in the road for the purpose of carrying off the effluent sewage as well as surplus water, and had been so used for many years without objection by the local authority:—

Held: (i) *prima facie*, the cost of lowering the gas main was a matter to which sect. 153 of the Public Health Act, 1875, applied, and, as there was no finding of the justices and no reason in law to displace the application of that section, the cost must, in accordance with its provisions, be borne by the inhabitants at large.

(ii) the cost of the proposed drainage works must also be borne by the inhabitants at large, as the local authority was in fact only proposing to place on the frontagers the cost of improvements which they desired to effect in a sewer system which had, in years gone by, been accepted by them as a satisfactory system, and this was not a case for the exercise of their powers under the Private Street Works Act, 1892.

[**EDITORIAL NOTE.** This case raises again the question of what charges may be placed upon frontagers. The alternatives in the present case are to place the expense upon either the frontagers or the inhabitants at large. The particular expense here in question is that of the lowering of a gas main already under the street, and it is held that it is provided by statute that this expense must be borne by the inhabitants at large.

As to Expenses which may be Charged against Frontagers, see HALSBURY, Hailsham Edn., Vol. 16, pp. 442, 443, para. 642; and for Cases, see DIGEST, Vol. 26, pp. 523-529, Nos. 2241-2269.]

Cases referred to:

(1) *Bonella* v. *Twickenham Local Board of Health, Holmes* v. *Twickenham Local Board of Health* (1887), 20 Q.B.D. 63; 26 Digest 527, *2263*; 57 L.J.M.C. 1; 58 L.T. 299.

(2) *East Barnet Urban District Council* v. *Stacey*, [1939] 2 K.B. 861; [1939] 2 All E.R. 621; Digest Supp.; 160 L.T. 561.

Appeal by way of case stated from a decision of justices for the borough of Weymouth and Melcombe Regis. The facts are fully set out in the judgment of Hilbery, J.

W. E. P. Done for the appellants.

C. Erskine Simes for the respondents.

Hawke, J.: The points which arise before us are two. I do not propose to state the general facts about this case and how it arises. The first point is whether the cost of lowering the gas main is an expense

which should properly be put on the frontagers. I content myself with saying that the Public Health Act, 1875, s. 153, which is now part of the Act of Parliament under which this work was undertaken, says, to my mind, quite clearly, that it is to be defrayed by the inhabitants at large, and one can well see the reason for it. If the construction of a section
A is clear, I do not know that one has to look for reasons for it. If Parliament has said it, it thereby becomes reasonable. It is perfectly obvious that a gas main may be put through a street not to feed the houses in that street at all, or to feed those houses and many other houses in other parts of the district. It is right and just, therefore, that the matter
B should be paid for by the inhabitants at large.

The other matter is the question of surface-water gulleys and other work attached to a foul-water sewer. I am content to base my decision on the fact that what is undertaken is plainly expenditure on improvements to the old system of drainage which the local authority
C have accepted. It is agreed by counsel for the appellants in his very clear argument that, if that is the truth, this expense is one which falls on the inhabitants at large as well. In those circumstances, it falls on these frontagers only in so far as they, as the inhabitants at large, will have to pay their share. Subject to that, it does not fall on these
D frontagers at all. Therefore, I think that this appeal should be dismissed.

Charles, J.: I agree. The matter seems to me to be very clear, and, when the matter is argued and threshed out, it is very simple. The
E first question to be decided arises in this way. The Weymouth Borough Corporation have sought to charge on the frontagers to Jesty's Avenue the price of lowering a gas main. The matter was considered before the justices, who were sitting for the purpose of hearing objections. There were 34 objectors, and the sum involved was £162 17*s.* 9*d.* They said:
F "This sum is improperly charged against us frontagers. It ought to be charged against the ratepayers as a whole." They prayed in aid the existence of the Public Health Act, 1875, s. 153, which was specifically retained, and was to be read with the Private Street Works Act, 1892, although sects. 150, 151 and 152 were specifically held not to apply to
G the Private Street Works Act, 1892. That section provides as follows:

> Where for any purpose of this Act [this section is to be read with the Private Street Works Act, 1892] any urban authority deem it necessary to raise sink or otherwise alter the situation of any water gas pipes . . . or gasworks laid in or under any street, they may by notice in writing require the owner of the pipes . . . or works to raise sink or otherwise alter the situation of the same . . . the expenses of or connected with any such alteration shall be paid by the urban authority; and if such notice
> H is not complied with the urban authority may themselves make the alteration required.

Here there had been a gas main, and they wanted to lower it, and so the gas main was lowered. Then it was sought to charge it against the frontagers, but I have come to the conclusion very clearly that it is just one of the matters to which sect. 153 most clearly applies. The justices found that that was so, and I think that they found perfectly correctly. It is made clear by the Private Street Works Act, 1892, that, where it says streets, it does not matter whether they are public streets or private streets. So much for the first point.

The second point arises upon drainage, and there £119 was sought to be charged against the frontagers because the corporation wanted to provide new water gulleys, and place concrete over an old sewer which is in the street, and make manholes for the old sewer, which is in use as a surface-water sewer. That matter was considered and threshed out thoroughly before the justices in 1936, and they gave a decision which is quite clear in its terms. The corporation upon that occasion contended that an old pipe which was there and ran through this road was only a surface-water drain, and not a sewer. The frontagers said: "It is strange that you should say that, because this pipe, although we agree that it has taken the surface water, has also taken the surplus water from 19 of the abutting houses." It was sought to say then that it was not to the satisfaction of the corporation, or had not been accepted or adopted by them, as a surface-water drain. The immediate answer came that it had been used both as a surface-water drain and as a sewer for the last 35 years, and the predecessors of the corporation, the rural district council, whose rights and liabilities were passed to the Weymouth Borough Corporation on the enlargement, had accepted the position that it was both a surface-water drain and a sewer. The justices have found that they cannot charge upon the frontagers the making of these new gulleys to take surface water and new manholes, because there was an accepted system of draining surface water there already. That system had existed for 35 years, and, that being so, they found—and, in my view, quite rightly found—that the responsibility must rest upon, the ratepayers, and not upon the frontagers. I agree with HAWKE, J., that this appeal fails.

HILBERY, J.: There was a resolution by the Weymouth Borough Corporation purporting to be made under the Private Street Works Act, 1892, s. 6, in respect of Jesty's Avenue in the borough of Weymouth. The resolution under sect. 6 was a resolution to sewer, level, pave, metal, flag, channel and make good that street. Included in the provisional apportionment was an amount of £162 17*s.* 9*d.*, the estimated cost of lowering the gas main already under the street, and an amount of £119 for providing new water gulleys, providing and placing concrete over the old sewer in the street, and making manholes for the old sewer, which is in use as a surface-water sewer. Objection was made by 34 of the frontagers to the whole of the item of £162 17*s.* 9*d.*, the cost of lowering the gas main, and to the item for providing the new water gulleys, placing concrete over the old sewer, and making the manholes for the old sewer which is in use as a surface-water sewer. It was upon those objections that the magistrates gave their decision in favour of the frontagers so

objecting, and it is from that decision that the Weymouth Borough Corporation now appeals to us. On the question of the item for the lowering of the gas main, I desire to say very little. I agree with what has fallen from HAWKE and CHARLES, JJ. For my part, it appears to me that, as the Public Health Act, 1875, s. 153, is to be read with, and,
A is part of, the Private Street Works Act, 1892, under which the corporation was acting, sect. 153 must be taken *prima facie* to cover the question of how the cost of lowering the gas main shall be dealt with. That being so, I ask myself whether there is any finding of the magistrates here which forces me to the conclusion that that section, which is of
B *prima facie* application, is displaced and that the matter has become one which can be dealt with by a provisional apportionment made pursuant to a resolution under the Private Street Works Act, 1892, s. 6, and, in consequence, placing the burden on the frontagers. I find no such conclusion of fact by the justices. Nor have I heard any
C argument which satisfies me that the operation of sect. 153 must, as a matter of law, be displaced. If the operation of sect. 153 is not displaced, then, of course, it plainly provides that the cost of lowering the gas main already in existence shall be borne by the inhabitants at large, and, if that be of full application and effect, then
D that indicates the persons upon whom the burden shall rest as a matter of law, and we cannot place it elsewhere as long as that section is the operative and effective section in the circumstances of the case.

With regard to the objections to the provision of the new water gulleys, the placing of concrete over the old sewer, and the making of
E manholes for the old sewer which is in use as a surface-water sewer, it appears to me plain that the situation with which the magistrates had to deal was this. For 35 years prior to 1936, there was in Jesty's Avenue a sewer which took sewage from the houses in Jesty's Avenue and the surface water from Jesty's Avenue and the houses. I should
F say that during the whole of that time no objection had ever been made, either by this council or by their predecessors in authority. In 1936, this corporation, resolving that they were not satisfied with the sewering of that road, made a proposal to charge on the frontagers the cost of a new sewer, and they came before these very justices on an objection
G being made to the cost of that proposed new sewer being placed upon the frontagers. When the magistrates heard that objection, the whole case for the authority was this: "There is a pipe in the road which cannot be said to be a sewer, since it does not take the foul water. It is a surface-water sewer." No objection was then stated by the council to
H that pipe, as they called it, as a surface-water sewer. Their resolution merely resolved that they were dissatisfied with the foul-water sewering of the street. To that contention the answer made by the frontagers was this: "This sewer, which has been in this road for 35 years without objection, is both a foul-water sewer and a surface-water sewer, and has been so all that time. Therefore, as you have made no objection

to it during that time, you cannot now say that you are dissatisfied or not satisfied with the sewering of this street, both as regards foul water and as regards surface water." The magistrates held that that contention of the frontagers in 1936 was a good contention, and well—founded, and in their very lucid judgment given on that occasion they found as a fact : A

> . . . that this old pipe was laid in the road for the purpose of carrying off the effluent sewage as well as surplus water, and had so been used for 35 years, and consequently it became a sewer vested in the rural district council, and, on the enlargement of the borough, in the Weymouth Town Council, and, by the opinion of LORD ESHER, M.R. in *Bonella* v. *Twickenham Local Board of Health* (1), any work necessary for renewing this sewer, or altering the course of it, or enlarging it by putting in a new sewer, must be paid for by the inhabitants at large, and not by the frontagers. B It was also decided on the authority of *Bonella* v. *Twickenham Local Board of Health* (1) that, when a sewer has existed for a long period of years, it must be inferred that the sewer has been accepted by the local authority as a sewer laid to their satisfaction, and that, the sewer being vested in them, it is their duty to keep it in repair.

C

It seems to me to be quite clear that in 1936 the justices did decide, as they say themselves in their judgment on this application which we are considering, that this street was sewered to the satisfaction of the local authority, and that the cost of a new sewer should not be charged against the frontagers. That being so, at the time when the resolution D was passed in respect of which the proposals to which objection was taken were made, this street was a street which was sewered, and for many years had been sewered, to the satisfaction of the urban authority. They could not, therefore, resolve, in respect of that sewer which was already there in 1936, to sewer. What emerges, as HAWKE, J., has E already pointed out, when they are making these provisional apportionments in regard to providing new water gulleys, placing concrete over the old sewer, and making manholes for the old sewer which is in use as a surface-water sewer, is that they are in truth and in fact only proposing to place on the frontagers the expense of improvements which F they desire to effect in a sewer system existent in the road approved by them in years gone by. That is not a matter which comes within the proper exercise of their powers under any resolution under the Private Street Works Act, 1892. The justices, having decided that these items were not properly chargeable as part of the expense of sewering the road, G since sewering the road was not now in question, rightly decided that these items could not now be held to be any part of the paving expenses in connection with the resolution passed under the Private Street Works Act, 1892, s. 6, since they had regard to the decision of this court in *East Barnet Urban District Council* v. *Stacey* (2). Counsel for the H appellants has desired to keep open the question whether or not that decision is correct, but I do not gather that he argues now before us that these charges which are sought to be made in respect of the provision of manholes and gulleys can be justified as any part of the paving expenses in connection with the proposals by the authority under the Private

Street Works Act, 1892, s. 6. In the circumstances, therefore, I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Percy Smallman*, Town Clerk, Weymouth (for the appellants); *Barnes & Butler*, agents for A *J. W. Miller & Son*, Poole (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

B *Re* TAYLOR, MIDLAND BANK EXECUTOR & TRUSTEE CO., LTD. *v.* SMITH AND OTHERS.

[CHANCERY DIVISION (Farwell, J.), **April 5, 1940.**]

Charities—Gift to fund—Purposes partly charitable and partly non-charitable —Employment of gift in discretion of committee—Whether gift void for C *uncertainty.*

The testator, after making certain bequests to his wife and daughters, directed his trustees to hold the residuary estate in trust for the Midland Bank Staff Association, Liverpool and District Centre, Fund, the trust to be administered in accordance with the constitution and rules of the fund. The objects of the fund as set out in its constitution were partly of a charitable and partly of a non-charitable character, and included, D *inter alia*, the rendering of financial assistance to past and present members of the staff of the Midland Bank, and, in particular, those employed in Liverpool and district branches. The constitution of the fund further provided that it was to be administered in accordance with the instructions of a committee, whose members were free to deal with it as they pleased. The question arose whether the gift was valid E or whether it was void for uncertainty:—

HELD: as, on the facts, the committee administering the fund were at liberty to deal with it at their own free will, there was nothing to render the gift invalid.

[EDITORIAL NOTE. Conveyancers, in framing gifts to institutions and societies, commonly rely upon the doctrine enunciated in *Cocks* v. *Manners* (1) and state F that the gift is to be employed both as to capital and income for the general purposes of the institution or society. In the present case a fund had been established in the testator's lifetime and vested in trustees. The trustees were to administer that fund as a committee should direct. The gift is held good, although no specific directions seem to have been given to the committee as to the application of the fund.

G AS TO GIFTS TO BE APPLIED AS TO BOTH CAPITAL AND INCOME AT DISCRETION OF COMMITTEE OR OTHER PERSONS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 128, 129, para. 170; and FOR CASES, see DIGEST, Vol. 8, pp. 325-329, Nos. 1078-1116.]

Cases referred to:

(1) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574; 8 Digest 245, *48*; 40 L.J.Ch. H 640; 24 L.T. 869.

(2) *Carne* v. *Long* (1860), 2 De G.F. & J. 75; 8 Digest 325, *1078*; 29 L.J.Ch. 503; 2 L.T. 552.

(3) *Re Clarke, Clarke* v. *Clarke*, [1901] 2 Ch. 110; 8 Digest 263, *250*; 70 L.J.Ch. 631; 84 L.T. 811.

ORIGINATING SUMMONS to determine whether or not a gift to a certain fund was valid. The facts, and the material parts of the constitution of the fund, are fully set out in the judgment.

J. Neville Gray, K.C., and *George Maddocks* for the plaintiffs.

C. E. Harman, K.C., and *Edward Ackroyd* for the first two defendants.

H. B. Vaisey, K.C., and *A. Guest Mathews* for the third defendant.

Hon. C. R. R. Romer, K.C., and *Hon. Denys B. Buckley* for the remaining defendants.

FARWELL, J.: This summons raises a question upon the will of one Sidney Edgerley Taylor. The testator made his will on Sept. 26, 1933. He made a codicil on Oct. 4, 1935, and he died on Aug. 16, 1938. By his will he appoints the Midland Bank Executor and Trustee Co., Ltd., to be executor and trustee thereof, and, after various bequests to various persons and institutions, he gives his residuary estate to the company upon trust for sale and conversion in the usual way, and upon trust for investment. He directs the company to stand possessed of the investments upon trust to pay a certain annuity to his wife, and, on her death, or, in the event of the annuity ceasing or being diminished before her death in certain events, then the capital is to form part of the residuary trust estate. He gives to his two daughters small legacies which in the same way, on the death of the daughters respectively, are to form part of the residuary estate. Then he deals with the whole of his residuary estate in this way:

> I direct the company to stand possessed of the residue of my estate and the investments from time to time representing the same (herein called my residuary trust estate) in trust for the Midland Bank Staff Association Liverpool and District Centre Edgerley Taylor Fund absolutely to be added to the sums already presented for the constitution of such fund and to be administered according to the constitution and rules approved and adopted at a general meeting of the said association in the year 1932 or any amendment thereof which may be agreed by me and approved and adopted by the said association provided always that in the event of the said Midland Bank Staff Association Liverpool and District Centre having ceased to exist at the date of my death I direct the company to stand possessed of my residuary trust estate in trust for the Liverpool University to found a chair to be called the Edgerley Taylor Chair to promote the education of dental surgery in the university.

That is the whole of the relevant part of the will.

The question which I have to determine is whether the gift of the residuary estate of the testator is good or fails either on the ground that it may offend the rule against perpetuity or on the ground that it is void for uncertainty or on some other ground. On behalf of the association, it is said that there is no question here of perpetuity, and that the gift is a good gift, and one to which effect can be given.

The facts relevant to that matter are to be found in the affidavit of one Baldry in the first place. He exhibits to his affidavit a copy of the constitution and rules mentioned in the testator's will of the Midland Bank Staff Association, Liverpool and District Centre, Edgerley Taylor Fund as approved and adopted at a general meeting of the Midland Bank staff held on Nov. 24, 1932. Then he states that he is informed that the constitution and rules have not been altered or amended in any way since they were approved. He then states:

> As appears from the preamble of the said constitution and rules, the said fund was founded and established by a gift of £200 by the testator to the Liverpool and District Centre of the Midland Bank Staff Association. The plaintiff has ascertained that the testator made the following further gifts. . . .

Then it appears that sums amounting in all to something between £500 and £600 were provided by the testator for this fund. The testator's residuary estate is a very considerable amount, and it is, therefore, a matter of importance to the persons interested to have the true construction of this will determined.

I propose now to turn to the rules of this association, which are as follows:

> Midland Bank Staff Association Liverpool and District Centre. Edgerley Taylor Fund.
>
> Constitution and Rules.
>
> Whereas Mr. S. Edgerley Taylor, being desirous of expressing his appreciation of the services rendered to him by the officers of the Midland Bank, Ltd., in the Liverpool district, has presented to the Liverpool and District Centre of the Midland Bank Staff Association, hereinafter called the Liverpool Centre, the sum of £200 and has expressed his intention to constitute the Liverpool Centre his residuary legatee under his will, a fund is herein constituted for administering the moneys so presented and hereafter to arise under the said will. This fund shall be known as the Midland Bank Staff Association, Liverpool and District Centre, Edgerley Taylor Fund. . . .

The objects of the fund are stated in r. 2 as follows:

> 2 . . . (*a*) To render financial assistance to past and present members of the staff of the Midland Bank, particularly those who have been or are employed in Liverpool and district branches, or their dependants who may be in genuine difficulties through sickness or other misfortune, and to assist any scheme which has for its objects the betterment of the health of members of the staff. (*b*) To give financial support to any institution or organisation which has for its object or one of its objects the welfare of past and present members of the staff of the Midland Bank, particularly those who have been or are employed in Liverpool and district branches, or their dependants and to any other charitable institution or organisation deemed worthy of such support. (*c*) To promote and encourage the efficiency of the staff of the Midland Bank. (*d*) To foster the development of social activities and recreation amongst the staff of the Midland Bank. (*e*) To promote the general welfare of the staff of the Midland Bank.

Rule 3 provides for the government of the fund:

> 3. The fund shall be governed by a committee consisting of not more than 7, of whom 4 shall form a quorum. The committee of the fund shall include *ex officio* the chairman, deputy chairman, treasurer and secretary of the committee for the time being of the Liverpool Centre.

The other members are to be elected by ballot, and then there is a provision as to how a vacancy occurring in the committee is to be filled. Rule 4 provides as follows:

> (*a*) The trustees of the fund shall be the Midland Bank Executor and Trustee Co., Ltd., in whose name all surplus funds and property of the fund shall be held and the trustees shall act in accordance with the instructions of the committee who may depute any one of their number to act for them jointly with the secretary for the purpose of transacting the business of the fund in conformity with the resolutions of the committee for the time being in force, but it shall not be the duty of any other person or persons who may be called upon to do any act or thing under the instruction or direction from the before-mentioned two duly authorised officers of the fund to ascertain that such instruction or direction is in conformity with the resolutions of the committee.

Then follows a direction with regard to investment and other similar matters, and r. 5 deals with procedure and the presentation of the report and balance sheet at the annual general meeting.

Those being the purposes and constitution of this fund, the question is whether the gift to the fund is valid. In order to get rid of one point at once, I may say that it has not been suggested here that this A gift is bad for perpetuity. Both counsel for the widow and counsel for the daughters of the testator have said that they do not desire to argue that this gift is bad as offending the rule against perpetuity, or as tending to a perpetuity. What is said is that this is a gift which is not charitable, and that it is a gift to no named person, but a gift to B be held upon trusts which are so vague and so uncertain that the court cannot give effect to the gift at all. They say that, if the court were called upon to execute the trusts of the fund as disclosed in the constitution, the whole thing is so vague and so uncertain that the court will be unable to give effect to such a trust. It is said, for instance, that C no one can ascertain for certain what is meant by "past and present members of the staff of the Midland Bank," and that, in those circumstances, it is a fund given upon a trust which is not charitable, and that, accordingly, the whole of the testator's residuary estate is undisposed of, and passes, therefore, to the next of kin of the testator, who D are the widow and the two daughters. In the first place, I may say at once that I have grave doubts—although I do not think it is necessary, in the view which I take in this matter, to decide it—whether the trusts contained in this document are charitable trusts. There is no doubt that some of them may be, but there are purposes for which the E fund may apparently be used which, in my judgment, are outside the proper definition of charity, and, consequently, the fund as a whole is not a fund which can be said to be held upon charitable trusts. The question, therefore, is whether there is any ground upon which it can be held that this gift does not take effect, having regard to the fact that F I do not propose to treat it as a gift for charitable purposes alone, and, therefore, as a good charitable gift.

As a matter of construction, in my view, this is a gift for the purposes of the fund, and, under the rules of the body, the persons to whom such moneys as may come to the fund are payable are the Midland Bank G Executor and Trustee Co., Ltd., who are named in the constitution as the persons who shall hold all surplus money and property, and shall deal with it in accordance with the constitution. Therefore, in my judgment, it is a gift to a fund, the hand to receive the money being the trustees of that fund. Of course, it cannot be suggested (and it is not suggested) H that that is in any sense a gift to the trustees beneficially. They hold the fund and must deal with it in accordance with the rules of the constitution. However, if, the fund being in the hands of the trustees, the members of the body are entitled to put an end to the provisions of the constitution, and to direct the trustees to hand over or divide the whole of the funds in their hands among all the then members of the body, then there is nothing which can render this gift invalid. It may be difficult to ascertain, for instance, the persons included in the class called "the past and present members of the staff of the Midland Bank," but that is a matter to be determined primarily by the person A in whose hands the money is, and it does not seem to me that the fact that there may be a question with regard to that renders this gift in itself invalid. It is in truth a gift of a fund which may be dealt with in accordance with the wishes of the members of the body which constitutes the fund in question, and there is nothing in the rules which regulate B the fund, so far as I can see, which prevents the whole matter from being wound up and the fund distributed among the persons who are entitled thereto.

The matter seems to me to be covered by authority. In the first place, I would desire to refer quite shortly to *Cocks* v. *Manners* (1). In C that case, the question arose with regard to gifts to various institutions, one of them being a gift to a convent at C. which is thus described in the headnote [p. 574]:

> . . . an institution consisting of Roman Catholic females living together by mutual agreement in a state of celibacy, under a common superior, for the purpose of D sanctifying their own souls by prayer and pious contemplation, and the Sisters of Charity of St. Paul at S.O., an institution composed of Roman Catholic women living together by mutual consent, whose primary object was personal sanctification, and who, as a means thereto, employed themselves in the exercise of works of piety and charity in teaching the poor and nursing the sick.

The testator in that case directed that payment should be made to the E superior for the time being of each of those two institutions respectively. SIR JOHN WICKENS, V.-C., held, according to the headnote:

> . . . the community of sisters at S.O. was a voluntary association and a charitable institution, and that the bequest to them was good as to the pure personalty. . . .

F With regard to the gift to the convent at C., it was held that that was not a good charity, and that it was not void on the ground of perpetuity. The only part of the judgment to which I wish to refer is that where SIR JOHN WICKENS, V.-C., says, at pp. 585, 586:

> The question remains whether the gift to the Dominican convent, which seems G to me not charitable, is void for perpetuity. It is argued that it is a gift in trust for the purposes of a perpetual institution, and, therefore, on a perpetual trust, and *Carne* v. *Long* (2) is relied upon. That case does not, I conceive, decide that a gift to a perpetual institution not charitable is bad—for instance, a gift to a club, or to a limited company; but merely that the gift in question there was a gift which the trustees could only give effect to by holding the property (which seems to have been all real estate) for ever, and applying the income according H to the rules. Nothing of that sort is directed here; the gift is ordered to be paid to the superior for the time being; and the superior, when she receives it, will be bound to account for it to the convent—to put it, so to speak, into the common chest; but when there it will be subject to no trust which will prevent the existing members of the convent from spending it as they please. It would, I conceive, be an extreme stretch of the rule against perpetuity to hold that it applies to a gift of this sort.

That case has been followed many times, and it was followed by

BYRNE, J., in *Re Clarke, Clarke* v. *Clarke* (3). That was the case of a gift:

> . . . to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks, or in any other way beneficial to that corps.

The headnote states as follows:

> The corps was founded shortly after the Crimean war in order to find employment for discharged and disabled soldiers and sailors . . .

Having reviewed many cases, BYRNE, J., held, at pp. 121, 122:

> . . . if and so far as any of the objects of this gift may be considered to be charitable, the gift is good on that ground. If and so far as the objects are not charitable, the gift is good, because, within the meaning of the authorities I have referred to, it does not tend to a perpetuity.

As I say, BYRNE, J., reviewed all the cases, and he came to the conclusion that the gift in that case was good, either on the ground that it was a good charitable gift or on the ground that there was nothing which rendered it invalid as offending the rule against perpetuity. As far as I can see, it was not argued in that case that the gift could be said to be void on any other ground.

In the present case, as at present advised, without hearing argument about it, I am not disposed to take the view that this case can be supported on the ground that it is a charitable gift. In my judgment, the decision in *Re Clarke, Clarke* v. *Clarke* (3) covers this case, because it shows that a gift to a fund or to a voluntary body of persons may be a perfectly good gift unless the fund or the purposes for which the institution was created prevent the persons who are members of the institution from dealing with it, both as to capital and income, in any way they please.

It seems to me that there is some little confusion of thought when I am asked to hold that the gift is bad on the ground that there is some ambiguity in the trusts which are set out as the purposes for which the fund is to be used. No doubt there might be a question if there were any doubt whether or not the fund could be divided up amongst the members. If it were suggested that there was some question whether, on the true construction of the trusts themselves, the income of the fund could alone be used, while the capital had to be retained, it might then become important and material to consider the trusts of the fund itself. Where, however, there is a gift to an unincorporated body of persons, and there is nothing in the rules or constitution of that body of persons which prevents them from using the fund so given to them in any way they please, by applying either capital or income to any of the purposes of the fund or by putting an end to the fund altogether and distributing the money between the members themselves, it appears to me that the fact that there may be some difficulty in construing the exact meaning of the rules of such an association is not a matter which can affect the validity or otherwise of the gift itself.

The gift is a gift to a particular unincorporated company or body of persons who have objects which seem good to them, and who are joined together in the form of an association. The association has rules, but there is nothing in the rules which prevents the association from being put an end to tomorrow and the whole of the funds divided up as the members of the association shall decide. In those circumstances, I think that this is a case which comes within the principle of the decision in *Cocks* v. *Manners* (1) relating to the gift to the lady superior of the convent, and within the principle of the decision in *Re Clarke, Clarke* v. *Clarke* (3), which has been followed by EVE, J., in two later cases. In my judgment, this is a gift to which the court must give effect, and I see nothing which prevents the gift from being a valid and effectual gift, and I make a declaration accordingly.

Declaration that gift valid. Costs as between solicitor and client payable out of residuary estate.

Solicitors: *H. E. Quick* (for the plaintiffs); *Norris, Allens & Co.*, agents for *J. M. Quiggin & Son*, Liverpool (for the first two defendants); *W. P. Davies & Son* (for the third defendant); *Fowler, Legg & Co.* (for the remaining defendants).

[*Reported by* F. HONIG, ESQ., *Barrister-at-Law.*]

WILKINSON *v.* CHETHAM-STRODE.

[COURT OF APPEAL (Slesser, Scott and Goddard, L.JJ.), **April 24, 25, 26, May 9, 1940.**]

Street and Aerial Traffic—Pedestrian crossing—Light-controlled crossing—Crossing with refuge—Whether refuge part of crossing—Pedestrian stepping from refuge—Contributory negligence—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, *regs.* 2, 3, 4, 5.

The plaintiff was crossing the road at a pedestrian crossing controlled by lights. At the centre of the crossing there was a refuge consisting of three paved sections, one carrying a lamp standard and the other two carrying pylons. The plaintiff had passed along the crossing to the island, and, after taking two or three steps from the island, he was struck and injured by the defendant's car. It was found as a fact that neither party was using reasonable care, and at common law the action would have been dismissed. It was contended that the plaintiff having been injured by a motor vehicle while on a pedestrian crossing was entitled to recover in spite of his contributory negligence:—

HELD: the refuge was a separate entity from the crossing and a person stepping abruptly from the refuge was in the same position as a person stepping abruptly from the pavement on to the crossing and could, therefore, be guilty of contributory negligence. On the facts, the plaintiff's negligence had contributed to the accident and the action would be dismissed.

Decision of ASQUITH, J. ([1940] 1 All E.R. 67) *affirmed.*

[EDITORIAL NOTE. The present case is very similar to that of *Chisholm* v. *London Passenger Transport Board* (2). It was there held that a person stepping from the pavement on to a light-controlled crossing might be guilty of contributory negligence. It had been previously decided in *Bailey* v. *Geddes* (1) that a person fairly and squarely on the crossing is, in practice, incapable of contributory negligence. The question thus arose whether the refuge was a part of the crossing, so that a person stepping from the refuge was in the same position as one stepping from the pavement, and this question is answered in the affirmative. The Lords Justices, however, are not agreed whether the correct view is that there are two crossings, one on each side of the refuge, or that there is only one crossing with a neutral area constituted by the refuge. Slesser, L.J., takes the former view.

As to Pedestrian Crossings, see HALSBURY, Hailsham Edn., Vol. 16, p. 492, para. 724; and for Cases, see DIGEST, Supp., Street and Aerial Traffic, Nos. 31a, 31b.]

Cases referred to:

(1) *Bailey* v. *Geddes*, [1938] 1 K.B. 156; [1937] 3 All E.R. 671; Digest Supp.; 107 L.J.K.B. 38; 157 L.T. 364.

(2) *Chisholm* v. *London Passenger Transport Board*, [1938] 2 All E.R. 579; Digest Supp.; 159 L.T. 32; *revsd.*, [1939] 1 K.B. 426; [1938] 4 All E.R. 850; 108 L.J.K.B. 239; 160 L.T. 79.

(3) *Schroeder* v. *Pittsburgh Railways Co.* (1933), 311 Pennsylvania St. Rep. 398.

Appeal by the plaintiff from a judgment of Asquith, J., dated Dec. 11, 1939, and reported [1940] 1 All E.R. 67. The facts are fully set out in the judgment of Slesser, L.J.

Cyril Salmon for the appellant.

W. H. Cartwright Sharp, K.C., and *R. O. Armstrong-Jones* for the respondent.

Slesser, L.J.: In this case, the plaintiff sued the defendant for damages alleged to have been sustained by the negligent driving by the defendant of a motor car, or, alternatively, for damages sustained by him through her breach of statutory duty. The statutory duty which it is said the defendant has broken is that imposed by the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 3, 5, made by the Minister of Transport under the Road Traffic Act, 1934, s. 18. The defendant contends that the plaintiff was guilty of contributory negligence. Having read the evidence in the case, I see no reason to differ from the findings of fact of the judge in his judgment. [His Lordship read the statement of facts set out in [1940] 1 All E.R., pp. 68-70.]

This conclusion of the judge that neither party was using reasonable care would determine this case in favour of the defendant were this to be a case where no question of pedestrian crossings, made in accordance with the statute and the regulations thereunder, arose. It is here contended on behalf of the plaintiff, however, that the defence of contributory negligence is not open to the defendant by reason of the application to this case of the decision in this court in *Bailey* v. *Geddes* (1), where the facts were that a collision occurred between a foot passenger who was crossing a road by a pedestrian crossing (though in that case one not controlled by light-signals) and a motor vehicle. The plaintiff was knocked down and injured by a motor car as he was about to step upon the far kerb, having nearly traversed the whole crossing. As has been said, he was fairly and squarely on the crossing. It was held that the driver of the motor car was liable, as the cause of the accident was the failure of the driver to observe the statutory regulation, and that a plea of contributory negligence on the part of the foot passenger on the particular language of the regulation was not open as a defence to the A driver of the motor car. As SCOTT, L.J., said, at p. 167 ([1937] 3 All E.R., at p. 676):

> I entirely agree with what SLESSER, L.J., has just said, that the idea of a plea of contributory negligence is fundamentally inconsistent with the very basis of the regulations.

B Referring to reg. 3, I said, at p. 166 ([1937] 3 All E.R., at p. 675):

> If the obligation on the driver of the vehicle under the regulations is to stop outside the crossing it is impossible that what is done inside the crossing can be the fault or the negligence of the plaintiff himself . . .

This view depended, not upon any general principle, but solely on the C actual language of the regulations then applicable—namely, reg. 3 and reg. 4.

On the other hand, where a pedestrian suddenly stepped from the footpath on to the crossing when a motor vehicle had approached so near to the crossing that it was clearly unsafe and careless to do so, it D has been held that the defendant may escape his liability by proving the contributory negligence of the plaintiff: *Chisholm* v. *London Passenger Transport Board* (2). The problem which arises in the present case has not been judicially decided. The pedestrian crossing here is at a road-intersection, where traffic is for the time being controlled by light-E signals, and, in such a case, by the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, reg. 5, the driver must allow free and uninterrupted passage to every foot passenger who has started to go over the crossing before the driver receives a signal that he may proceed over the crossing.

F On the facts of this case, when the plaintiff started from the west side of Artillery Row and crossed to the refuge, the defendant had not received a signal that she might proceed over the crossing. The lights thereafter changed, and she received her signal to proceed before the plaintiff reached the refuge. At the time when she started to traverse the crossing G on the other side of Victoria Street, the defendant, waiting in Buckingham Gate in her car for the change of light-signal, was thus under an obligation to give to the plaintiff free and uninterrupted passage. The plaintiff relies also on reg. 3, which provides that the driver of every vehicle approaching a crossing, whether controlled or not, shall:

> H . . . unless he can see there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.

The defendant admits that she did see the plaintiff on the refuge. It is apparent from the decision in *Bailey* v. *Geddes* (1) that, quite apart from any consideration of light-signals, the obligation imposed on drivers by reg. 3 applies to all pedestrian crossings, controlled or not controlled, and, had the plaintiff been well on the crossing before he was knocked down, no plea of contributory negligence could have been sustained. It is said on behalf of the defendant, however, that this is a case resembling *Chisholm* v. *London Passenger Transport Board* (2), in that the pedestrian suddenly and carelessly stepped on to the crossing from the refuge, a place of safety, which, therefore, must be regarded as was the pavement in that case.

The problem, which is not an easy one, resolves itself into this. If the crossing be regarded as one continuous crossing within the regulations, and the presence of the refuge is to be ignored, the case is clearly within the principle of *Bailey* v. *Geddes* (1) both under reg. 5, in that the defendant, before she received a signal that she might proceed over the crossing, failed to give free and uninterrupted passage to the plaintiff, and under reg. 3, in that, being unable to say that she could see that there was no foot passenger thereon, in approaching the crossing she did not proceed at such a speed as to be able to stop, if necessary, before reaching the crossing. If, however, the presence of the refuge is to be regarded as causing some modification in the application of the regulations to the crossing, other considerations may arise.

By the respondent, however, it is said that there are here two crossings within the meaning of the regulations, the one from the east side of Artillery Row to the refuge, and the other from the refuge to the west side of Artillery Row, or alternatively, that, if the proper view be that this is one crossing, then there is in the middle of that crossing a zone of safety to which the regulations cannot be said to apply, and, therefore, when it is said that free and uninterrupted passage is to be given to every foot passenger who starts to go from the crossing, that must be understood to mean starts to go into the area of danger which might otherwise be interrupted, and ceases when the area of safety is reached and he becomes a refugee, and that an entirely fresh obligation on the driver begins when the pedestrian starts from the other side of the refuge to complete the transit. On the assumption that there is one crossing, this latter view would not appear to me to protect the defendant against the provisions of reg. 3. That regulation speaks merely of a foot passenger on the crossing. It does not distinguish between the first and the second part of it, and takes no account of the refuge.

There remains the question, however, whether there was here one crossing or two. A crossing is defined by reg. 2, unless the context otherwise requires, as a:

> . . . crossing-place for foot passengers indicated by a traffic sign prescribed for the purpose by regulations made by the Minister.

In my view, the judge was mistaken in coming to the view that there was anything in *Chisholm's* case (2) to compel the court to decide that this was one crossing. True, it is that in that case Scott, L.J., although there was a refuge, speaks of the whole area to be crossed as the crossing, but the question here raised was not before the court, nor material to their decision, and I regard the matter as *res integra.* The definition of "crossing" in the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, reg. 2, assumes at the outset that a crossing, within the contemplation of that regulation, means a crossing-place for pedestrians, and goes on to define the type of crossing-places covered by the A order, but the phrase "crossing-place for foot passengers" makes it clear, to my mind, that the definition is dealing with an area where such passengers may expect to encounter in their crossing peril from traffic other than that of foot passengers, and that it is the carriageway which foot passengers may desire to cross which is the subject-matter of the B definition. Such an implication, derived from the word "crossing," is found in terms in reg. 4, which speaks of a free and uninterrupted passage to any foot passenger who is on the "carriageway" at such crossing, and the same regulation goes on to speak to the same effect when it provides that "every foot passenger shall have precedence over all vehicular C traffic at such crossing." Reg. 5, which we have here particularly to consider, though it does not use the word "carriageway," speaks of a vehicle "at or approaching a crossing" at a road-intersection, and uses the word "crossing," I think, in the same sense.

For these reasons, apart from a general consideration of the mischief D to which the regulations are directed, it is apparent, in my view, that a refuge where by its nature a foot passenger cannot possibly be in any reasonable peril of encountering vehicular traffic is not part of a crossing, albeit one or more of the crossings on each side of the refuge are indicated by a traffic-sign as in the definition clause provided. There is E nothing in the regulations, therefore, to prevent the conclusion that there are here two crossings to be considered. The definition in reg. 2 speaks of a crossing-place for foot passengers indicated by a traffic-sign, using the singular. The traffic-signs in the present case consisted of studs, which, according to the evidence, were arranged as required by F statutory directions to show, by their distances apart one from the other, which way the stream of traffic was expected to proceed, according to whether it was going north or south in Artillery Row on one side or other of the refuge, and, in so far as the traffic-signs are any indication, there were required and provided different series of traffic-signs on one G side of the refuge from those on the other. Under the Traffic Signs (Pedestrian Crossings) No. 2 Provisional Regulations, 1934, where light-signals are installed for the regulation of traffic, and the directions given under the Road Traffic Act, 1930, s. 48, a band of metal on the carriageway must indicate the line beyond which vehicular traffic must not H proceed when signalled to stop at traffic-signals. There is consequently provided in the area between the pavement on the west side of Artillery Row, where there is a traffic-light, and the refuge a metal band across the road, but no such band is provided across the eastern half of Artillery Row from the refuge to the eastern pavement, where there is no such traffic-light. Thus, so far as the physical treatment by traffic-signs is concerned, it would point to two crossings, and not one. It is significant to observe that the definition speaks of a traffic-sign in the singular, as I have already pointed out, indicating, as I think, one system of traffic-signs for each crossing.

However, I arrive at my conclusion that this ought properly to be regarded as two crossings apart altogether from the actual nature of the traffic-sign and studs laid down, as prescribed, from a consideration of the nature of the regulations themselves. All the regulations under the Pedestrian Crossings Places (Traffic) Provisional Regulations, 1935, here to be considered seem to me to contemplate an area where the safety of the pedestrian is sought to be established, and areas not so in need of protection are not statutory crossings. Thus, reg. 3 speaks of the foot passengers thereon, and requires the driver of the vehicle in appropriate circumstances to proceed at such a speed as to be able, if necessary, to stop before reaching such crossing. Such a regulation, I think, cannot be applied properly to a place of safety such as the refuge, where the question whether or not the driver should stop can scarcely arise unless he is preparing to drive over the refuge. Reg. 4 says, in the case of traffic not controlled by constables or light-signals, that every foot passenger on the carriageway at such crossing shall be allowed free and uninterrupted passage and have precedence over all vehicular traffic at such crossing. It is difficult to conceive the circumstances in which a foot passenger would be in need of claiming precedence over vehicular traffic while he was on the refuge, which, on the argument of the plaintiff, must be regarded as a part of the crossing. Similar considerations arise as to the free and uninterrupted passage to the foot passenger who has started to go over the crossing when applied in reg. 5 to a refuge, and on reg. 6, which says that no driver shall cause a vehicle to stop upon a crossing in certain circumstances, a provision entirely inappropriate to the refuge.

I do not think that this last regulation could properly be construed to refer to the refuge, for it has reference to the prevention of obstruction of vehicular traffic by pedestrians on the crossing as such. So also reg. 7, which provides that no foot passenger shall remain upon a crossing longer than is necessary for the purpose of passing from one side of the road to another with reasonable dispatch. If a passenger were to pause on the refuge to light a pipe, I do not think that he would offend against reg. 7.

Similarly, when sect. 18 of the statute under which these regulations are made is considered, it authorises them to be made:

> . . . generally with respect to the movement of traffic including foot passengers at and in the vicinity of a crossing.

It does not appear to deal with an area of safety in which the pedestrian requires no protection from the movement of traffic. A further reason for this view may be found in the Metropolis Management Act, 1855, whereby it was made lawful for local authorities to place erections in carriageways so as to make the crossing thereof less dangerous to foot passengers, and there is a corresponding provision in the Public Health Acts (Amendment) Act, 1890, s. 39, whereby authorities may place in any street, being a highway, places of refuge for the purpose of protecting passengers, and prevent, either on the street or on the footways, injury, danger or nuisance; or for the purpose of making the crossing of any street less dangerous to passengers: see also the Local Government Act, 1929, Sched. I, and the Road Traffic Act, 1930, s. 55. For a considerable time, it is apparent, the legislature has regarded a refuge as a place of safety from vehicular traffic for passengers on crossings. In my view, therefore, the regulations made under the Road Traffic Act which we have here to consider, are dealing, not with the area of the refuge, but with the crossing as such, which, in the ordinary course of events, will be traversed both by pedestrians and by vehicles to the peril of the former, unlike the refuge which is by its nature for the use of pedestrians alone.

Thus, having come to the conclusion that there were here two separate crossings interrupted by a refuge, it follows that the defendant properly can plead the contributory negligence of the plaintiff as a defence. The judge says that, once the pedestrian steps off an island, he is stepping from something which is not part of the crossing on to something which is. I agree, though for different reasons, and, applying *Chisholm's* case (2), it follows that the appellant is capable of contributory negligence if he steps on to the second crossing in such a way that traffic travelling at a reasonable speed cannot stop in time to avoid hitting him and the driver cannot be said to have an opportunity to give precedence to the foot passenger. This the plaintiff did in the present case. In my view, therefore, while I disagree with the judge's conclusion that there was here only one crossing, I agree that the refuge should not properly be regarded as part of the crossing for the purpose of these regulations as applied to the facts of this case, and am of opinion that, by reason of his own negligence, the plaintiff fails, and this appeal should be dismissed.

SCOTT, L.J.: I agree. It seems to me wholly impossible to suppose that in drafting the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, pursuant to the Road Traffic Act, 1934, s. 18 (2), the Minister should have intended to ignore the widespread and long-established usage of erecting in busy thoroughfares so-called places of refuge for pedestrians, where they can safely pause between the streams of vehicular traffic. That public practice has long been followed by local authorities in the United Kingdom, and, although the danger to pedestrians was infinitely less in degree before the days of motors, it was the same in kind. The pedestrian had to face then as now a double danger. As he started to cross a road, he had to face the risk of collision with the stream of traffic approaching from his right and flowing across his path at right angles, and midway in his transit he had to face the reverse stream coming from his left. For each half of the stream he had to look in a different direction, and the midway point of his transit, where the opposing tides bordered on each other, was obviously the zone of maximum danger. Hence the place of refuge in the middle of the road. That usage dates back for nearly a century. When the principal Pedestrian Crossing Regulations were drafted, the practice of pedestrians pausing on the refuge in order to avoid danger before resuming their passage across the road was notorious. The interpretation which the appellant would put upon reg. 5 of the 1935 regulations disregards the whole of that long-standing social system of our road traffic. Unless the wording is so clear and unambiguous as to compel a construction which would ignore the existence and use of refuges, I am not prepared to accept it, and, if I were so compelled, I should doubt the validity of the regulation, as my present inclination is to think that it would not be *intra vires* the Road Traffic Act, 1934, s. 18.

The question of *ultra vires*, however, does not, in my view, arise and I express no final opinion upon it. However, the language of sect. 18, and, indeed, of the two Road Traffic Acts, may properly be prayed in aid, not only on the issue of *ultra vires*, but also for the purpose of construing the language of the regulations where it is ambiguous, and for that purpose I think that the language of sect. 18 throws some light. The Road Traffic Act, 1934, s. 42 (1), provides that that Act is to be construed as one with, *inter alia*, the Act of 1930. Sect. 48 of the earlier Act by subsect. (1) and subsect. (2) provides for " traffic signs," and subsect. (9) provides that that expression shall include " all devices for the guidance or direction of persons *using roads*." Sect. 55 gives power to urban local authorities (in the present case, the city of Westminster) :

> . . . for the purpose . . . of making the crossing of any road less dangerous to foot passengers, [to] erect . . . places of refuge in the road. . . .

In this provision, the word " crossing " means the act of crossing. Sec. 18 of the 1934 Act provides by subsect. (1) for the establishment of crossings for foot passengers, and by subsect. (2) for regulations by the Minister in these terms :

> The Minister may make regulations with respect to the precedence of vehicles and foot-passengers respectively, and generally with respect to the movement of traffic (including foot-passengers), at and in the vicinity of a crossing (including regulations prohibiting foot-passenger traffic on the carriageway within 100 yds. of a crossing), and with respect to the indication of the limits of a crossing by marks on the roadway or otherwise, and to the erection of traffic signs in connection therewith.

A " crossing " in this subsection means the place where a pedestrian may cross. Subsect. (3) provides as follows :

> Different regulations may be made under this section in relation to different traffic conditions and, in particular, but without prejudice to the generality of the foregoing words, different regulations may be made in relation to crossings in the vicinity of, and at a distance from, a junction of roads, and to traffic which is controlled by the police, and by traffic signals, and by different kinds of traffic signals, and which is not controlled.

In relation to traffic controlled by light-signals, subsect. (3) should be construed in the light of sect. 49 of the 1930 Act, which, as amended by sect. 36 of the 1934 Act, now reads as follows:

> Where a police constable is for the time being engaged in the regulation of traffic in a road, or where any traffic sign being a sign for regulating the movement of traffic or indicating the route to be followed by traffic [and being of the prescribed size, colour and type, or of another character authorised by the Minister] has been lawfully placed on or near any road in accordance with the provisions of the last preceding section, any person driving or propelling any vehicle who (*a*) neglects or refuses to stop the vehicle or to make it proceed in or keep to a particular line of traffic when directed so to do by the police constable in the execution of his duty; or (*b*) fails to conform to the indication given by the sign, shall be guilty of an offence.

Under that section, it is the duty of traffic to obey the orders of a controlling police constable, and "to conform to the indication given by the sign"—e.g., traffic-lights. If I may disregard the amber, it imposes on motor traffic at a light-controlled road-intersection a duty to stop when the light turns red, but to go on when the light turns green, and, in my opinion, the interpretation of the sections and regulations relating to pedestrian traffic at pedestrian crossings must be made with due regard to those duties of the vehicular traffic. The object of sect. 49 is plainly to promote the steady and regular flow of such traffic by preventing unnecessary delay in forward movement at controlled crossroads where one stream has *ex hypothesi* to be stopped to allow the cross-stream to flow, and each flow is, therefore, necessarily intermittent. These considerations, in my view, have a direct bearing on the statutory function of refuges for pedestrians.

The stress of the appellant's argument was very properly laid upon the contrast between the language of reg. 4 and that of reg. 5, and particularly upon the omission from reg. 5 of the words "on the carriage-way." I agree that this is the cardinal difficulty of construction, and, in my view, it is the only serious obstacle to the only interpretation of the regulation which accords with common sense, with justice and with our old-established road system of refuges for the protection of pedestrians. In the United States of America refuges are called "zones of safety." Legislation there is not the same as ours, but it is well-recognised that it is negligence on the part of a pedestrian carelessly to step off a refuge into the road, and so to expose both vehicular traffic and himself to danger: see, as an illustration of this commonsense view, *Schroeder* v. *Pittsburgh Railways Co.* (3). The fundamental purpose of our refuges also is to serve as zones of safety. Having regard to the express provision of sect. 55 of the Act of 1930 in regard to "places of refuge *in* the road," I find it impossible to suppose that the sections of the two Acts (which are to be read as one), and the regulations thereunder about pedestrians crossing the road, are to be construed either as if there were no refuges in the roads, or as if their presence there should be disregarded in considering the mutual duties of vehicles and pedestrians. The very fact that for nearly a century, pursuant to general legislation, refuges have been placed at the dividing line between the two opposing streams of vehicular traffic—the point of most danger to a pedestrian crossing a road—seems to me conclusive that the statutory intention of the regulations is to enable a pedestrian who has successfully passed through the one stream of traffic to pause in safety and turn his head in the direction from which the other stream is coming, both for his own sake and for that of the vehicular traffic, and I cannot conceive the possibility of so construing reg. 5 as to relieve the pedestrian of that duty of attention and care, unless the meaning of it be so explicit as to compel that construction. So far is this from being the case, that I think that the express reference to refuges in regs. 2 and 3 and in the Schedule of the Traffic Signs (Pedestrian Crossings) Provisional Regulations, 1934, in conjunction with which the Pedestrian Crossing Regulations, 1935, obviously have to be read, points exactly the other way, and renders it necessary to read reg. 5 equally with reg. 4 as impliedly subject to qualification when there is a refuge in the road. For the purpose of such a construction, one of two solutions must be adopted, either that of SLESSER, L.J. (with which *Chisholm's* case (2) is in no way inconsistent), that there are two "crossings," one on each side of the refuge, or, if, as a matter of interpretation, there is only one "crossing" between the one side of the road and the other, then the alternative solution that midway in the crossing over the road there is an area which is no more part of "the crossing" than it is of the "carriageway" on each side of it. In this interpretation, the pedestrian on the refuge temporarily loses his right to walk on, regardless of approaching traffic. He comes under a duty momentarily to give way and wait there till he can step on to the further half of the road without causing difficulty or serious inconvenience to oncoming traffic, as this court said in *Chisholm's* case (2), in regard to the comparable case of leaving the pavement. In the result, I cannot regard the omission from reg. 5 of the words contained in reg. 4 "*on* the carriageway" as a sufficient reason for adopting an interpretation which would exonerate the pedestrian from all duty of care when on or leaving the refuge.

This is the only interpretation of reg. 5 which seems to me consistent, not only with the legal duty of care, but also with that social or moral duty of courtesy of the pedestrian to the motorist. Safety today depends much on the mutual courtesy and considerateness of all road users, and to exempt the pedestrian from his legal duty in the way contended by the appellant would be a direct encouragement to conduct the very opposite of courteous and considerate. I think that the judgment of ASQUITH, J., was right, and that the appeal should be dismissed.

I may add that I am in complete agreement with the view about to be expressed in the judgment of GODDARD, L.J., as to the desirability of a change in the law making applicable to such a case as this the Admiralty rule as to apportionment of damage.

Goddard, L.J.: As both Slesser and Scott, L.JJ., are of opinion that this judgment should be upheld, I think that I ought to resolve in favour of the defendant the doubts which I have felt, and need only add a few words. As I understand *Bailey* v. *Geddes* (1), which is binding on this court, though open to review elsewhere, if the driver of a vehicle is proved to have committed a breach of these regulations, it is not open to him to set up the defence of contributory negligence, because the pedestrian has a right to assume that the vehicle will not be on the crossing and that he has the undisputed right of way. *Chisholm* v. *London Passenger Transport Board* (2) in no way impugned that decision, but it was held in the particular circumstances of that case that the driver had not committed a breach of reg. 3 or of reg. 4, and could, therefore, rely on the negligence of the plaintiff as a defence. In the present case, the lights were in favour of the plaintiff when he left the pavement on the west side, but were against him, and in the defendant's favour, when he reached—and, indeed, before he reached—the refuge. In my opinion, therefore, the sole question is whether the mouth of Artillery Row is to be regarded as one single crossing or two. That is to say, is the space between either side of the refuge and the pavement to be considered as a separate crossing? If, as the judge held, it is to be regarded as one entire crossing, I see no escape from the conclusion that the plaintiff had started to go over the crossing before the lights turned in the defendant's favour and was thus entitled to the full right of way. But for the reasons given by Slesser and Scott, L.JJ., I think that this would result in what would be really an unworkable state of affairs, and that consequently we ought to hold that the presence of a refuge does turn what would otherwise be one single crossing into two. On this view the case is exactly covered by *Chisholm* v. *London Passenger Transport Board* (2), and the plaintiff must fail. He started from the refuge when the defendant had the right of way, and the latter had no opportunity of avoiding him. It is unfortunate, I venture to think, that these regulations do not deal in any way with the presence or absence of refuges at these crossings, and I am left in complete doubt as to whether the omission is due to accident or to design. When one remembers that not only in London but also in many provincial towns there are large numbers of light-controlled crossings, some with refuges upon them and some without, one hopes that this case will not escape the notice of the Minister of Transport, so that some further or amended regulations may be issued clarifying the position. The regulations have to be observed every hour of the day by the man in the street, using that expression in the most literal sense, and there ought to be no doubt as to the respective obligations and privileges which they impose or confer on drivers and pedestrians.

It will be observed that this court is upholding the judgment for reasons not altogether identical with those on which the judge based his decision. I call attention also to the difference between reg. 4, dealing with uncontrolled crossings, and reg. 5, dealing with those controlled. In the one case, the right of way is given to persons on the carriageway, and in the other it is given to persons who have started to go over the crossing. If these two expressions mean the same thing, I see no reason for the difference in the language used. If they do not, the public have a right to be told in clear language what the differentiation in language A is intended to effect.

I may perhaps also be allowed to add that this case seems to show in a striking manner how desirable would be an alteration in the law enabling common law courts to apply the Admiralty rule as to apportionment of damage to collisions on land, as was recommended by the Law B Revision Committee in their last report. Here the judge has found, as I read his judgment, that each party contributed to the accident in about equal degrees. The plaintiff suffered grievous injury and the defendant none, yet the whole loss falls on the plaintiff. It would have been equally hard had the defendant been obliged to bear it all, whereas, C if the Admiralty rule could be applied, the damage would have been shared, and the defendant would thus have recovered half the loss.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Pothecary & Barratt* (for the appellant); *Stanley & Co.* (for the respondent). D

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

END OF VOLUME 2